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Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, PETITIONER,

vs.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1954

CERTIORARI GRANTED NOVEMBER 15, 1954

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,246

JOHN PUNNETT PETERS, *Appellant,*

v.

OVETA CULP HOBBY, Individually and as Secretary of Health, Education and Welfare, et al., *Appellees.*

Appeal From The United States District Court For The District of Columbia.

JOINT APPENDIX

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1 Filed Feb. 18, 1954

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN PUNNETT PETERS, 123 Marvel Road,
New Haven, Connecticut

v.

OVETA CULP HOBBY, individually and as Secretary of Health, Education and Welfare; PHILIP YOUNG, GEORGE M. MOORE and FREDERICK J. LAWTON, individually and as members of the United States Civil Service Commission; JOHN H. HESSEY, SR., JOHN H. AMEN, and WILLARD L. KING, individually and as members of the Loyalty Review Board of the United States Civil Service Commission.

Complaint For Injunction And Declaratory Judgment

Plaintiff by his attorneys, complaining of the defendants, alleges that

1. Plaintiff is a natural born citizen of the United States and is a resident of New Haven, Connecticut.

2. The defendant Oveta Culp Hobby is an individual doing business and residing in the District of Columbia with offices at 3rd and Independence Avenue, Southwest, and is Secretary of the Department of Health, Education, and Welfare of the United States Government. Said defendant is sued individually and as Secretary of the said Department. The defendants Philip Young, George M. Moore and Frederick J. Lawton are individuals found doing business in the District of Columbia with offices at 8th and F Streets, Northwest, in the District of Columbia and are members of the United States Civil Service Commission. Said defendants are sued individually and as
2 members of the said Civil Service Commission. The defendants John H. Hessey, Sr., John H. Amen and Willard L. King are individuals found doing business in the District of Columbia with offices at 8th and F Streets, Northwest, in the District of Columbia and are members of

the Loyalty Review Board of the United States Civil Service Commission. Said defendants are sued individually and as members of the said Loyalty Review Board.

3. Jurisdiction of this Court arises under §§ 11-305 and 11-306 of the District of Columbia Code, under 28 U.S.C. §§ 2201 and 2202 and under 5 U.S.C. § 1009. Jurisdiction is also based on the First, Fifth and Sixth Amendments to the Constitution of the United States, and on Articles 1 and 3 thereof.

4. Plaintiff has been a member of the faculty of the Yale Medical School, New Haven, Connecticut, since 1921 and is presently senior professor of Medicine at Yale University. He is an internationally eminent physician, educator and scientist and his name and reputation within the profession, prior to the events detailed herein, for integrity and disinterested scholarship, were excellent. He has done outstanding research for the Armed Forces and on other projects in the field of medicine, in addition to his extensive teaching and clinical duties.

5. For several years prior to 1953, plaintiff was employed by the United States as Special Consultant in the Public Health Service of the Federal Security Agency, acting an an advisory capacity to the Surgeon General of the United States Public Health Service. (On March 12, 1953, the functions of the Federal Security Agency were transferred to the Department of Health, Education and Welfare, which is hereinafter referred to as the "Department".) His duties, which required his presence in Washington for about ten days each year, related to proposals to grant federal assistance to medical research institutions under the Public Health laws. His work was not confidential or sensitive and did not entail access to, or use of, classified material. Plaintiff had been appointed to this position because of his eminence in the field of medical science; his service throughout the period of employment was of the highest value to the United States.

6. Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency, by letter dated January 7, 1949, informed plaintiff that information relating to his loyalty had been received, and enclosed an interrogatory requesting certain information purporting to be relevant to his employment with the United States Government. This interrogatory related to membership in certain organizations and sponsorship of certain movements. Plaintiff answered this communication under oath on January 17, 1949.

7. On or about February 18, 1949, plaintiff received a letter from said McElvain stating that, on the basis of the information before the Board, it had determined that no reasonable grounds existed for belief that plaintiff was disloyal to the Government of the United States.

4 8. On or about December 18, 1951, plaintiff received a third letter from the said McElvain dated December 17, 1951. This letter contained some sixteen charges of activity purportedly evidencing disloyalty, most of which had been treated in the communications of January 7, and January 17, 1949. They related to purported membership in the Communist Party, sponsorship of certain petitions, affiliation with various organizations, and alleged association with members of, and sympathizers with, the Communist Party. The letter also advised plaintiff that he might answer the charges in writing within ten days and stated that he had a right to an administrative hearing before a panel of the Board at which he might present evidence in his behalf.

9. Plaintiff replied under oath to the charges in a letter to the said McElvain on December 26, 1951, denying that he had ever been a member of the Communist Party and setting forth information with respect to the other charges.

10. On March 13, 1952, the said McElvain, by letter to plaintiff's counsel, transmitted certain purported allegations of fact in support of the charges. These allegations were purported to be based on a part of the information

against plaintiff in the Board's files. A number of the allegations were stated to be summaries of information disclosed to unidentified government investigators by unidentified persons.

11. On April 1 and 2, 1952, the Board of Inquiry on Employee Loyalty, Federal Security Agency, conducted a purported hearing in the matter in New Haven, Connecticut.

12. The Board did not state the standard of "loyalty" applicable to the facts to be considered by it. It did not further specify the nature of the purportedly "disloyal" actions or views of plaintiff. It stated that the purported allegations in the letter of March 13, 1952, did not constitute the entire body of information against plaintiff in its files which would be considered. The sources of the purportedly derogatory information, with the possible exception of the source of the information purportedly relevant to Charge No. 9, in the Board's files were not identified or made available to counsel for plaintiff for purposes of cross-examination. They were not known to the Board. The Board specifically stated that it did not know whether the statements were under oath.

13. At the hearing, the Government tendered no documentary evidence. No witness testified that plaintiff was disloyal.

14. Plaintiff testified under oath that he had never been a member of the Communist Party and denied or explained the other charges. He answered all questions directed to him. His testimony refuted any implication of disloyalty. It was supported factually and reinforced in its conclusion by the testimony of seventeen witnesses who appeared at the hearing and by that of twenty additional witnesses in his favor who submitted affidavits, letters or statements.

15. The relevant evidence of record before the Board consisted only of testimony and affidavits favorable to the plaintiff.

16. Plaintiff was notified, by letter from said McElvain, dated May 23, 1952, that the Board of Inquiry had deter-

mined that, on all the evidence, there was no reasonable doubt as to plaintiff's loyalty to the Government of the United States.

6 17. Thereafter, by letter of April 6, 1953, Hiram Bingham, Chairman of the Loyalty Review Board, informed plaintiff that said Board had determined to conduct a post-audit of the action of the Board of Inquiry and, to this end, "hold a hearing and reach its own decision".

18. A panel of said Loyalty Review Board, composed of defendants Hessey, Amen and King, conducted a purported hearing in New Haven, Connecticut, on May 12, 1952.

19. The Chairman did not specify the standard of disloyalty to be adopted in regard to the evidence to be submitted at this hearing. He stated that the charge Number 9, which had been dismissed in the previous hearing, would not be considered in this purported hearing. But he refused to state which of the other charges were the subject of inquiry.

20. Here again no evidence or testimony was adduced in support of any of the charges. Again the identity of the purported confidential informants, whose disclosures were summarized in support of certain of the charges, was not disclosed to plaintiff. With the exception of the source of the information as to Charge 1, they were unknown to the Board. The confidential "information" was not disclosed under oath and the Board knew none of the circumstances surrounding these disclosures which would be relevant to an evaluation of the reliability or credibility thereof.

21. Plaintiff's counsel asked the panel if it would reveal the identity of the anonymous informant under Charge 1. The panel declined to reveal the identity of such in-

7 formant. Plaintiff's counsel sought to ascertain where the burden of proof lay in the present purported hearings and whether the burden was upon plaintiff to convince the Board that there was no reasonable doubt as to his loyalty or whether the Board would find in his

favor unless it was persuaded by some quantum of proof that there was reasonable doubt as to his loyalty. Again plaintiff's counsel was unable to get an answer. Plaintiff's counsel sought to ascertain the conception of loyalty entertained by the Board according to which plaintiff's behavior would be measured. Again plaintiff's counsel was unable to get any helpful answer. Plaintiff's counsel inquired of the Board whether the issue in these purported hearings was reasonable doubt as to plaintiff's loyalty to the Government of the United States or reasonable doubt as to plaintiff's complete and unswerving loyalty to the Government of the United States. Plaintiff's counsel received no answer to this question.

22. The Board stated that the record in the previous hearings would be made a part of the evidence of record in this hearing. The Chairman stated that the panel also had and would consider evidence not disclosed to the plaintiff, and perhaps not related to the charges.

23. Plaintiff again testified in his own behalf. He stated his political beliefs, his firm allegiance to democratic principles of government and the Constitution of the United States, and his loyalty to the rights of individuals as guaranteed therein. He voluntarily discussed the purported charges, and answered all questions put to him by counsel for, and members of, the Board. He set out his motives for signing the various petitions and statements made
8 the subjects of most of the purported charges. He willingly explained the circumstances surrounding membership in certain organizations, not treated in the purported charges, in reply to questions by members of the Board. He denied specifically and affirmatively that he had ever been a member of the Communist Party and testified at length to his disbelief in the doctrine of the overthrow of the government by force. He reiterated publicly expressed convictions which are specifically inconsistent with those of a Communist.

24. Five witnesses also testified in his behalf. Two of these witnesses, Doctors Welt and Nichols, ex-students at

Yale Medical School, had not testified in the previous hearing. Three of the witnesses, Ex-President Charles W. Seymour of Yale University, Dean C. M. Hugh Long, former dean of the Yale Medical School, and Judge Charles E. Clark of the Court of Appeals for the Second Circuit, had previously testified. Each stated his long acquaintance with the plaintiff and supported by specific details his firm conviction in plaintiff's loyalty to the Constitution and the Government of the United States.

25. The record contained no evidence to the contrary.

26. The aforesaid Bingham, by letter dated May 22, 1953, advised plaintiff's counsel that the panel had decided that "on all the evidence, there is a reasonable doubt as to Dr. Peter's loyalty to the Government of the United States." The letter did not disclose the basis or reasons for this conclusion. It did state that the Secretary of the Department of Health, Education and Welfare had been notified
9 of the Board's finding and recommendation that plaintiff be removed from his position with the Public Health Service, and that plaintiff had "been barred from the Federal service for a period of three years from May 18, 1953, and any and all pending applications or existing eligibilities are cancelled."

27. On June 12, 1953, the Department of Health, Education and Welfare formally advised plaintiff of his separation and disqualification for federal service. On the same day, the Surgeon General of the Public Health Service notified plaintiff of his separation from his position as Special Consultant effective June 12, 1953. No person attached to the Department exercised discretion in this matter, in that the transcript of the purported hearing had not been transmitted to the Department prior to May 29, 1953, on or before which date the Department had determined to approve and adopt the proceedings and decision of the Board.

28. On June 15, 1953, defendant Hobby stated that motions made by plaintiff's counsel that the transcript be remanded to the Loyalty Review Board in order to permit

the filing of a motion for rehearing before the full Board had been denied. On September 25, 1953, Nelson Rockefeller, Assistant Secretary of the Department of Health, Education and Welfare rejected a written request by plaintiff's counsel to discuss the matter.

29. Defendants Young, Moore and Lawton, acting as the Civil Service Commission, ordered plaintiff's eligibility for federal employment cancelled for a period of three years.

10 30. Plaintiff has suffered and is suffering substantial injury from the unlawful actions of the defendants. These actions have made employment with the federal government impossible. They have, in addition, branded him as disloyal to his country. His excellent and deserved reputation in the community and throughout the medical profession has thus been irreparably damaged, arbitrarily and without any basis in fact.

31. Plaintiff has exhausted all remedies before any and all administrative agencies of the United States. There exists no other adequate remedy at law for the injuries to which he has been and is being subjected.

32. The proceedings and hearings of the Loyalty Review Board, the decision of the Board that there was reasonable doubt of plaintiff's loyalty, the separation of plaintiff from his position and the declaration of ineligibility because of the decision of the Board, were in violation of Executive Order 9835 and the Constitution of the United States:

I. These actions were in violation of Executive Order 9835, March 21, 1947, as amended by Executive Order 10241, April 21, 1951, in that:

A. The purported charges did not, as required by Executive Order 9835, Part II, §§ 2b, 4, inform plaintiff of the charges against him "in sufficient detail, so that he will be enabled to prepare his defense" or protect his "rights of . . . notice". Certain of the purported charges communicated to the plaintiff, including the charge relating

to association with members of, and sympathizers
11 with, the Communist Party, were fatally vague and indefinite in failing to allege the time and place of specific overt acts, events, or persons. The charges did not refer to all the information against plaintiff in the Board's files which the Board eventually considered. The charges did not refer to specific overt acts of disloyalty and did not inform plaintiff in what way they supported an inference of disloyalty.

B. The purported charges were not, as required by Executive Order 9835, Part II, § 2b, "stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The Department exercised no discretion in determining the specificity and completeness of the purported charges. In respect to most of the purported charges the discretion, if any, was exercised by the Federal Bureau of Investigation.

C. The proceedings did not, as required by Executive Order 9835, Part II, § 4, honor the plaintiff's "rights of hearing" since no valid, effective or meaningful hearing was held before the Loyalty Review Board.

D. The purported hearing was not an "administrative hearing" as required by Executive Order 9835, Part II, § 2a, and did not produce a record from which a determination of the purported charges could be made "on all the evidence" as required by Executive Order 9835, Part V, § 1, as amended by Executive Order 10241, inasmuch as:

(1) Plaintiff was given no opportunity to confront and cross-examine any witnesses against him.

(2) Plaintiff was given no opportunity to rebut undisclosed information against him.

12 E. The purported hearing was further conducted in violation of Executive Order 9835 in that the Inquiry Board on Employee Loyalty, Federal Security Agency, treated as evidence a purported "listing" by the

Attorney General of the United States of organizations within the purview of Executive Order 9835, Part III, § 3, Part V, § 2f, which purported "listing" was not made "after appropriate investigation and determination" as required by Executive Order 9835, Part III, § 3.

F. The decision of the Loyalty Review Board was not made, as required by Executive Order 9835, Part V, § 1, "on all the evidence." No evidence of disloyalty was adduced. The information referred to the Board from other sources was not evidence and was not and could not have been properly weighed by the Board.

(1) Purported Charge No. 1 was based on the statement of an unidentified informant. While the name of the informant was known to the Board, the Board refused to disclose the name to plaintiff. The Board did not know whether the informant's statement was under oath, had no evidence about possibly relevant security considerations, and had no information upon which to evaluate the reliability of the alleged informant or the credibility of his alleged statements. The Board relied entirely upon a representation of the Federal Bureau of Investigation, the basis of which was not disclosed to it, that the informant was reliable.

(2) Purported charges Nos. 2, 3, 4, 5, 6, 7, 9, 11, 14 and 16 were also based on the statements of unidentified informants. In respect to these charges, the Inquiry Board was even unaware of the identiy of the informants, did not know whether their statements were under oath, and relied entirely on a representation by the Federal Bureau of Investigation upon undisclosed grounds that the informants were reliable.

G. The Department and Board were not, as required by Executive Order 9835, Part IV, § 2, furnished with "sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by

them." The identity of the confidential informants and the circumstances of their statements were not even disclosed to the Board. That the Federal Bureau of Investigation's certification of reliability is no adequate basis for evaluation was demonstrated in the purported hearing where it appeared that one informant certified to be reliable was guilty of misrepresentation so gross that charge Number 9 was dismissed by the Board and was not thereafter considered either by the Inquiry Board or the Loyalty Review Board panel, that three other informants certified to be reliable were either irresponsible or deliberate falsifiers, that two informants certified to be reliable contradicted each other about the same matter, and that no reasons were presented to the plaintiff or to the Board or the Department, as to why the informants in question were believed by the Federal Bureau of Investigation to be reliable, or of the identity of the official of the Federal Bureau of Investigation who made the characterization of reliability.

H. The Board exercised power beyond its power "to make advisory recommendations ... to the head of the ... agency", as defined by Executive Order 9835, Part III, § 1a, and the defendant Hobby and the Department failed to exercise any discretion in adopting the recommendation of the Board, in that the Board's recommendation was adopted by the Department arbitrarily, and without examination of the record.

14

H. The actions deprived the plaintiff of liberty and property without due process of law in that they branded him as a person disloyal to his country, arbitrarily, without basis in fact, and without a fair procedure and hearing.

These actions were taken without adequately specific standards of loyalty, without a sufficiently definite statement of charges or allegations of fact, without a meaningful hearing, without evidence of disloyalty, without the confrontation and cross-examination of witnesses, on the

basis of undisclosed information which plaintiff had no opportunity to refute, and without a statement of the reasons plaintiff was declared ineligible and disloyal. The imposition of the penalty of ineligibility for government service constituted a violation of the prohibition against bills of attainder and *ex post facto* laws by punishing the plaintiff by declaring him ineligible to serve the Government without a judicial trial or a fair administrative hearing under accepted standards. The actions were based solely on evidence of plaintiff's political opinions as expressed in his sponsorship of, and affiliation with, the political movements which were the subject of the charges, and thus violated the right of freedom of speech and opinion. The actions constituted an exercise of judicial authority and power, not in accord with established principles of due process and in violation of Article III of the Constitution.

15 WHEREFORE, the plaintiff prays that:

1. The Court render a declaratory judgment (a) that plaintiff was improperly removed from his position as special consultant to the Public Health Service in the Department of Health, Education and Welfare; (b) that plaintiff is entitled to reinstatement to said position in the Public Health Service; (c) that defendant Hobby had no authority to remove plaintiff upon the recommendation of the Chairman of the Loyalty Review Board based on the findings and decision of the panel of that Board.

2. The Court order defendant Hobby to reinstate the plaintiff to his position as Special Consultant to the Public Health Service.

3. The Court order defendant members of the Civil Service Commission to expunge from its record the findings of the panel of the Loyalty Review Board and its decision that there was reasonable doubt as to plaintiff's loyalty to the Government of the United States.

4. The Court order the defendant members of the Civil Service Commission to expunge from its record any ruling or declaration that this plaintiff has been barred from Federal Service for a period of three years from May 18, 1953, and that all pending applications or existing eligibilities be cancelled.

5. The Court enjoin defendant members of the Civil Service Commission from interfering in any way with plaintiff's reinstatement in the Department of Health, Education and Welfare or his employment in any other position for which he is eligibile or in any other Department or Agency of the United States.

16 6. That the Court grant such other and further relief as may be just, lawful and equitable in the premises.

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* * * * * * * * * * *

17 Filed May 4, 1954

Answer

Defendants answer the allegations of the complaint as follows:

1. Defendants admit the allegations of paragraph 1 of the complaint.

2. Defendants deny that defendants John H. Hessey, Sr., John H. Amen, and Williard L. King are members of the Loyalty Review Board of the Civil Service Commission. Defendants allege that said named defendants ceased to be members of said Loyalty Review Board on September 24, 1953, on which date said Loyalty Review Board ceased to exist, pursuant to Executive Order 10450 (April 27, 1953, 18 F.R. 2489). Defendants allege that this cause is moot as to said named defendants.

Defendants admit the remaining allegations of paragraph 2 of the complaint.

3. Defendants deny the allegations of paragraph 3 of the complaint.

4. Defendants admit that plaintiff is a professor of medicine at Yale University and that he has a reputation as an eminent physician, educator, and scientist. Except as herein admitted, defendants deny the allegations of paragraph 4 of the complaint for lack of knowledge and information sufficient to form a belief.

18 5. Defendants admit and allege that for several years prior to 1953 plaintiff was employed by the United States on a when-and-as-employed basis, with compensation at a specified per diem rate for days actually employed, as Special Consultant in the Public Health Service of the Federal Security Agency, acting in an advisory capacity to the Surgeon General of the United States Public Health Service; that effective April 10, 1953, and pursuant to Reorganization Plan No. 1 of 1953 and Public Law 13, 83d Cong., 1st sess., approved April 1, 1953 (67 Stat. 18), the functions of the Federal Security Agency were transferred to the Department of Health, Education and Welfare; that plaintiff's duties in such capacity, which required his presence in Washington for from four to nine days each year, related to proposals to grant federal assistance to medical research institutions

under the Public Health Laws; that plaintiff's work was not confidential or sensitive and did not entail access to, or use of, classified material; that plaintiff was appointed to this position because of his eminence in the field of medical science and his service throughout the period of such employment was of value to the United States. Except as herein admitted, defendants deny the allegations of paragraph 5 of the complaint.

6. Defendants admit the allegations of paragraph 6 of the complaint and allege that the letter to plaintiff dated January 7, 1949, and the interrogatory (referred to in said paragraph) specified particular acts and associations of plaintiff with specified organizations, movements, and meetings as the subjects of information relating to plaintiff's loyalty.

7. Defendants admit the allegations of paragraph 7 of the complaint.

Defendants allege that by letter to plaintiff dated August 21, 1951, Ernest M. Allen, Chief, Division of Re-
19 search Grants, National Institute of Health, extended an invitation to plaintiff, in the name of the Surgeon General, to accept an appointment ending December 31, 1953. to serve as a member of a Metabolism and Nutrition Study Section; that plaintiff by a letter dated August 24, 1951, to said Ernest M. Allen accepted the invitation to serve as a member of said Metabolism and Nutrition Study Section for a term ending December 31, 1953; and that plaintiff had no appointment to any position in the Government of the United States for a term extending beyond December 31, 1953.

Defendants further allege that by letter dated May 21, 1951, L. V. Meloy, Executive Secretary of the Loyalty Review Board of the Civil Service Commission, wrote the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency that plaintiff's case should be reopened and readjudicated pursuant to Executive Order No. 10241 (April 28, 1951, 16 F.R. 3690); that on

August 17, 1951, Burton L. French, Acting Chairman of the Loyalty Review Board of the Civil Service Commission wrote the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency that a panel of the Loyalty Review Board had considered the complete file on plaintiff's case, had concluded that the derogatory material contained in the file was too serious to justify the adjudication of the case on the basis of an interrogatory and therefore recommended that plaintiff's case be remanded to the Board of Inquiry on Employee Loyalty of the Federal Security Agency with instructions that a letter of charges be issued to plaintiff and a hearing held thereon so that the case would be fully developed prior to an adjudication.

8. Defendants admit the allegations of paragraph 8 of the complaint and allege that the letter to plaintiff of December 17, 1951 (referred to in said paragraph) specified the particular acts and associations of plaintiff with specified organizations, movements, and meetings which constituted the basis of the 16 charges stated in said letter.

20 9. Defendants admit the allegations of paragraph 9 of the complaint and allege that by letter to plaintiff dated December 28, 1951, the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency informed plaintiff that the letter of charges to plaintiff dated December 17, 1951, was sent because the Loyalty Review Board of the Civil Service Commission had remanded the case with instructions that a letter of charges be sent plaintiff and a hearing held and also because new information was received bearing on plaintiff's loyalty.

10. On March 13, 1952, the Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency transmitted to plaintiff's counsel a written statement of certain information in the possession of said Board as to the particular acts and associations of plain-

tiff with specified organizations, movements, and meetings which constituted the basis for said charges. Said statement indicated that certain particular items of such information had been received from confidential informants whose identities were not disclosed by said statement. Except as herein admitted, defendants deny the allegations of paragraph 10 of the complaint.

11. Defendants admit the allegations of paragraph 11 of the complaint, except that they deny that the hearing referred to in said paragraph was a "purported" hearing.

12. Said hearing before the Board of Inquiry on Employee Loyalty of the Federal Security Agency was attended by plaintiff in person and by his counsel. At said hearing plaintiff's counsel referred to the applicable standard for removal as set forth in Executive Order No. 10241 (April 28, 1951, 16 F.R. 3690). At said hearing the Chairman of the Board referred to the statement of information which had been sent to plaintiff's counsel by the Chairman's letter to him of March 13, 1952, as to the particular acts and associations of plaintiff which
21 formed the basis of the charges. The Chairman further stated that the charges which had been served on plaintiff would not be considered as evidence against him. The sources of the information as to the facts bearing on the charges against plaintiff were not identified at the hearing or made available to counsel for plaintiff for cross examination. The identity of one or more of the informants furnishing such information, but not of all such informants, was known to the Board. The Chairman stated that the Board did not know whether or not the information given by a confidential informant as to facts bearing on Charge No. 1 against plaintiff had been given under oath. Except as herein admitted, defendants deny the allegations of paragraph 12 of the complaint.

13. No witness testified at the hearing that plaintiff was disloyal. Except as herein admitted, defendants deny the allegations of paragraph 13 of the complaint.

14. At the hearing plaintiff testified under oath that he had never been a member of the Communist Party and testified with respect to the other charges against him. Plaintiff did not refuse to answer any question directed to him. Eighteen witnesses who were called by plaintiff testified at the hearing and plaintiff's counsel submitted affidavits, letters or statements by approximately 40 additional persons. Except as herein admitted, defendants deny the allegations of paragraph 14 of the complaint.

15. Defendants deny the allegations of paragraph 15 of the complaint.

16. Defendants admit the allegations of paragraph 16 of the complaint.

17. Defendants admit the allegations of paragraph 17 of the complaint and allege that the letter of April 6, 1953, referred to in said paragraph of the complaint, informed plaintiff that the review of his case by the Loyalty Review Board was made pursuant to Regulation 14 of the Regulations for the Operations of the Loyalty Review Board.

22 18. Defendants admit the allegations of paragraph 18 of the complaint except that they deny that the hearing referred to in said paragraph of the complaint was a "purported" hearing.

19. Defendants allege that at the hearing the Chairman of the panel of the Loyalty Review Board stated that Charge No. 9 against plaintiff, which had been dismissed in the previous hearing of plaintiff's case, would not be considered in the present hearing; that the panel of the Loyalty Review Board would consider plaintiff's case on the basis of the entire record before it, including the record made in connection with the earlier hearings by the Board of Inquiry on Employee Loyalty of the Federal Security Agency; and that the standard applicable to plaintiff's case was that set forth in Executive Order 9835 as modified by Executive Order 10241. Except as herein expressly admitted, defendants deny the allegations of paragraph 19 of the complaint.

20. Defendants allege that at the hearing before the panel of the Loyalty Review Board the only evidence or testimony adduced was that adduced by counsel for plaintiff; that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to plaintiff; that the identity of one or more of such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath. Except as herein expressly admitted, defendants deny the allegations of paragraph 20 of the complaint.

21. Defendants allege that the panel declined the request of plaintiff's counsel to reveal the identity of the confidential informant who had given information in connection with Charge No. 1; that the Chairman stated that the panel would reach its own conclusion, upon all the evidence, as to whether there was a reasonable doubt of plaintiff's loyalty, but declined further to specify where
23 the burden of proof lay; and that the Chairman stated that the applicable standard was that provided by Executive Order 9835 as modified by Executive Order 10241. Except as herein expressly admitted, defendants deny the allegations of paragraph 21 of the complaint.

22. Defendants allege that the Chairman of the panel stated that the record in the previous hearings of plaintiff's case would be made a part of the evidence of record in the present hearings; and that the panel would consider evidence given by confidential informants not disclosed to plaintiff. Except as herein expressly admitted, defendants deny the allegations of paragraph 22 of the complaint.

23. Defendants allege that at the hearing before the panel of the Loyalty Review Board plaintiff testified in his own behalf; that he stated certain of his political beliefs and his motives for engaging in certain actions and

associations which were the subjects of the charges against him; that he answered all questions put to him by counsel for and members of the panel; and that he denied that he had ever been a member of the Communist Party. Except as herein specifically admitted, defendants deny the allegations of paragraph 23 of the complaint.

24. Defendants admit that the five witness identified in paragraph 24 of the complaint testified on behalf of plaintiff at the hearing; that three of them had testified at earlier hearings in plaintiff's case; and that each stated his acquaintance with plaintiff over a period of several years and his firm conviction in plaintiff's loyalty. Except as herein specifically admitted, defendants deny the allegations of paragraph 24 of the complaint.

25. Defendants allege that at the hearing before the panel of the Loyalty Review Board no evidence was adduced except that adduced by counsel for plaintiff, but allege that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for plaintiff. Except as herein specifically admitted, de-
24 fendants deny the allegations of paragraph 25 of the complaint.

26. Defendants admit the allegations of paragraph 26 of the complaint and allege that the letter of May 22, 1953, referred to in said paragraph of the complaint, advised plaintiff that he had been barred from the federal service for a period of three years from May 18, 1953, and any and all pending applications or existing eligibilities were cancelled pursuant to Civil Service Regulation 5.101(a) (5 C.F.R., § 5.101(a)).

27. Defendants admit that on June 12, 1953, the Surgeon General of the Public Health Service notified plaintiff of his separation from his position as Special Consultant in the Public Health Service effective June 12, 1953. Except as herein expressly admitted, defendants deny the allegations of paragraph 27 of the complaint.

28. Defendants admit that on June 15, 1953, defendant Hobby wrote plaintiff's counsel that requests by him that the transcript be remanded to the Loyalty Review Board to permit the filing of a motion for rehearing before the full board had been denied, on the ground that plaintiff had appeared and offered evidence at two hearings, that under all the circumstances it did not appear that a stay of proceedings or further hearings would be in the interests of the federal service, and that there appears to be no authority for a remand by a department to the Loyalty Review Board. Defendants admit that on September 25, 1953, Nelson A. Rockefeller, Under Secretary of the Federal Security Agency, wrote plaintiff's counsel that the Secretary of the Federal Security Agency had given due consideration to plaintiff's case and that a discussion with plaintiff's counsel would not seem to be of any assistance in determining a further course of action but that if plaintiff's counsel desired to submit a brief on legal or procedural arguments, it would be received and considered. Except as herein expressly admitted, defendants deny the allegations of paragraph 28 of the complaint.

25 29. Defendants admit that the Loyalty Review Board, as the duly authorized agent of defendant Young, Moore and Lawton, the members of the Civil Service Commission, ordered plaintiff's eligibility for federal employment canceled for a period of three years from May 18, 1953, pursuant to Civil Service Regulation 5.101(a) (5 C.F.R., § 5.101(a)).

30. Defendants admit that their actions have as a practical matter made plaintiff's employment with the Federal Government impossible until May 18, 1956. Defendants deny that they have branded plaintiff as disloyal to his country or that they have committed any unlawful acts against him. Except as herein expressly admitted, defendants deny, for lack of knowledge and information sufficient to form a belief, the allegations of paragraph 30 of the complaint.

31. Defendants admit the allegations of paragraph 31 of the complaint except that they deny, for lack of knowledge and information sufficient to form a belief, that plaintiff has been or is being subjected to injuries.

32. Except as expressly admitted in the preceding paragraphs of this answer, defendants deny the allegations of paragraph 32 of the complaint.

ADDITIONAL DEFENSES

1. The complaint fails to state a claim upon which any relief can be granted.

2. As to defendants Hessey, Amen, and King, members of the former Loyalty Review Board, the case is moot.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
Attorney, Department of Justice

DONALD B. MACGUINEAS
Attorney, Department of Justice

* * * * * * * * * * *

27 Filed May 7, 1954

Motion For Judgment On The Pleadings Under Rule 12

Plaintiff moves the Court to enter judgment on the pleadings in favor of plaintiff herein on the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, plaintiff states that it appears clearly from the complaint and answer that plaintiff was dismissed from government employment on the basis of

a finding of reasonable doubt as to his loyalty which was made in violation of Executive Order 9835 and the Constitution of the United States.

Respectfully submitted,

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Washington 6, D. C.

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1229-19th Street, N. W.
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1229-19th Street, N. W.
Washington 6, D. C.
Of Counsel.

Date: May 7, 1954

* * * * * * * * * *

30 Filed May 13, 1954

Motion of Defendants For Judgment On The Pleadings

Now come defendants and move the court for judgment on the pleadings in favor of defendants on the basis of the undisputed facts appearing in the complaint and answer.

Defendants allege the following grounds for such motion:

1. The complaint fails to state a claim upon which relief can be granted.

2. The cause is moot in that plaintiff's term of appointment to the position from which he was removed has completely expired.

3. The cause is moot as to the defendants Hessey, Amen and King since they are sued as members of the Loyalty Review Board of the Civil Service Commission and that board is no longer in existence.

WARREN E. BURGER
Assistant Attorney General

EDWARD H. HICKEY
DONALD B. MACGUINEAS
Attorneys, Department of Justice

Counsel for Defendants

* * * * * * * * * *

37 Filed May 19, 1954

Order For Judgment On The Pleadings For Defendants

This cause came on to be heard on cross motions of plaintiff and defendants for judgment on the pleadings, and counsel having been heard, it is hearby

ORDERED that the defendants' motion be and it is hereby granted, that the plaintiff's motion be and it is hereby denied, and that judgment on the pleading be and it is hereby entered for the defendants.

EDWARD A. TAMM
Judge

Dated: May 19th, 1954

* * * * * * * * * *

38 Filed May 19, 1954

Notice of Appeal to Court of Appeals Under Rule 73(b)

Notice is hereby given that John Punnett Peters, pla
tiff above named, hereby appeals to the United Stat
Court of Appeals for the District of Columbia from t
final judgment on the pleadings for defendants entered
this action on May 19, 1954.

THURMAN ARNOLD

Attorney for Plaintiff
John Punnett Peters
1229 - 19th Street, N.W.
Washington 6, D. C.

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

STIPULATION—Filed August 3, 1954

Appellant and appellees, by their respective counsel, stipulate as follows:

1. Appellant was, at the time of his separation from office by the Surgeon General of the Public Health Service, employed as a Special Consultant in the Public Health Service, Department of Health, Education and Welfare, on a when-and-as-employed basis, with compensation at a specified per diem rate for days actually employed, to advise the Surgeon General with respect to proposals to grant federal assistance to medical research institutions under the Public Health Laws.

2. At such time appellant was a professor of medicine at Yale University and he was appointed to this consultant position because of his eminence in the field of medical science.

3. At the time of both his appointment to and removal from such consultant position, the following group of positions was excepted from the classified competitive service; i.e., placed in Schedule A to Civil Service Rule No. 6:

> "Professional, Scientific, and technical experts for temporary part-time or intermittent employment for consultation purposes." (5 C.F.R., § 6.101(n).)

[fol. 28] At such times Civil Service Rule VI provided that "Appointment under either Schedule A or B shall not confer a competitive status" (5 C.F.R., § 6.1(d)).

4. Accordingly, appellant was not in the classified competitive civil service when he was separated from his consultant position.

(S.) Thurman Arnold, Counsel for Appellant. (S.) Warren E. Burger, Assistant Attorney General. (S.) Paul A. Sweeney, Attorney, Department of Justice. (S.) Donald B. MacGuineas, Attorney, Department of Justice, Counsel for Appellees.

[fols. 29-30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1954

No. 12,246

JOHN P. PETERS, Appellant,

v.

OVETA CULP HOBBY, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Miller, and Prettyman, Circuit Judges

JUDGMENT—Filed August 5, 1954

The above-entitled case came on for consideration on the record on appeal from the United States District Court for the District of Columbia, on appellant's motion to enter judgment on the merits without formal briefs or argument and on appellees' reply thereto, and on the stipulation of the parties filed herein August 3, 1954. The parties agree that the case presents the same issue decided by this Court in Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F. 2d 46 (D.C. Cir. 1950). The Supreme Court affirmed the judgment of this Court therein by an equally divided Court, Bailey v. Richardson, 341 U.S. 918. We feel obliged to follow the ruling in that case in the determination of the present case.

On Consideration Whereof, It is Ordered by this Court that appellant's motion for the entry of judgment on the merits in this case without formal briefs or argument be, and it is hereby, granted, and it is Further Ordered and Adjudged by this Court that the judgment of the United States District Court for the District of Columbia on appeal herein be, and it is hereby, affirmed.

Dated: August 5, 1954.

Per Curiam.

Edgerton, Circuit Judge, concurs in granting appellant's motion but dissents, for the reasons stated in his dissent in Bailey v. Richardson, from the judgment of affirmance.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 15, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
SEP 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARNOLD, FORTAS & PORTER

By

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The District Court wrote no opinion (J.A. 25). The judgment of the Court of Appeals, setting out the basis for its determination of the case (R. 29) is not reported, but is set out in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1954 (R. 29; Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

This case presents the same question presented but decided only by an equally divided court in *Bailey* v. *Richardson*, 341 U. S. 918:

Whether, following a loyalty board hearing which produced only favorable evidence, a person may be adjudged ineligible for government service and dismissed from non-sensitive federal employment as a result of secret information given by informants who were not under oath, who were not presented at the hearing and whose identities were not disclosed to the employee.

THE REGULATION AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Executive Order 9835, 12 F.R. 1935, March 21, 1947 (5 U.S.C. [Cumm. Supp.] following Section 631), as amended by Executive Order 10241, 16 F.R. 3690, April 30, 1951, and Article I, Section 9, Clause 3 and the Fifth Amendment to the Constitution of the United States. Their texts are set forth below, in Appendix A, *infra*.

STATEMENT OF THE CASE

The case comes to this Court from the affirmance of a judgment on the pleadings for defendants in the trial court. Neither party introduced testimony or documentary evidence below. The statement which follows is therefore based solely on the facts pleaded in the complaint and the admissions and allegations of the defendants in their answer.

* * *

John Punnett Peters is an eminent physician and medical teacher. He is the senior professor of medicine at Yale University (Cplt. Para. 4, J.A. 3; Ans., Para. 4, J.A. 15).

For some few years prior to 1951, Dr. Peters had been employed by the Public Health Service of the Federal Se-

curity Agency.[1] Peters served as a Special Consultant, retained to advise directly the Surgeon General. His only work related to proposals to grant federal assistance to medical research projects under the public health laws of the United States. It was non-sensitive. Dr. Peters at no time had access to confidential or strategic information (Cplt., Para. 5, J.A. 3; Ans., Para. 5, J.A. 15-16).

It is specifically admitted that "plaintiff was appointed to this position because of his eminence in the field of medical science and his service throughout the period of such employment was of value to the United States" (Ans., Para. 5, J. A. 16). In January of 1949, however, he received a letter from Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Agency, informing him that information "relating to his loyalty had been received" (Cplt., Para. 6, J. A. 4; Ans., Para. 6, J. A. 16). The letter enclosed a detailed interrogatory relating to various of Peters' political activities and requested him to supply the Agency with the information called for therein. Peters completed the form and returned it on January 17, 1949. Shortly thereafter the Board notified him that it had no evidence for holding him disloyal (Cplt., Para. 7, J. A. 4; Ans., Para. 7, J. A. 16).

Almost two years later, in December of 1951, however, plaintiff was informed that the Agency was to reconsider the question of his loyalty, this time through a formal hearing before its own Board of Inquiry. Again by letter, this one dated December 17, McElvain wrote him stating formally that some sixteen charges of questionable activity on his part had been noted, including this time, a charge of membership in the Communist Party of the United States (Cplt., Para. 8, J. A. 4; Ans., Para. 8, J. A. 17). By letter, Peters again answered the allegations. He cate-

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[1] The agency has since achieved departmental status. Pursuant to Reorganization Plan No. 1 of 1953 and Public Law 13, 83d Cong., 1st Sess., approved April 1, 1953, 67 Stat. 18, its functions were transferred to the Department of Health, Education and Welfare on April 10, 1953. Defendant Hobby is its Secretary.

gorically stated that he had never been a member of the Communist Party (Cplt., Para. 9, J. A. 4; Ans., Para. 9, J. A. 17).

Prior to the hearing, on March 13, 1952, McElvain sent him what purported to be "a written statement of certain information in the possession of said Board." He stated that "certain particular items of such information had been received from confidential informants whose identities were not disclosed by said statement" (Ans., Para. 10, J. A. 17-18).

The hearing of the Agency Board of Inquiry on Employee Loyalty was held in New Haven on April 1 and 2, 1952. In their answer, the defendants state:

> "The sources of the information as to the facts bearing on the charges against plaintiff were not identified at the hearing or made available to counsel for plaintiff for cross examination. The identity of one or more of the informants furnishing such information, but not of all such informants, was known to the Board. The Chairman stated that the Board did not know whether or not the information given by a confidential informant as to facts bearing on Charge No. 1 against plaintiff had been given under oath." (Ans., Para. 12, J. A. 18).

Peters adduced the only evidence during the entire two days of the hearing; no witnesses took the stand against him (Ans., Para. 13, J. A. 18). Peters swore under oath that he had never been a member of the Communist Party and answered all questions posed him by the Board and its counsel (Ans., Para. 14, J. A. 19). His testimony as to his loyalty was supported with "affidavits, letters or statements by approximately 40 additional persons" (*Ibid*).

Within two months, on May 23, 1952, McElvain wrote Dr. Peters stating that the Board of Inquiry had determined again that there was no doubt as to his loyalty (Cplt., Para. 16, J. A. 5-6; Ans., Para. 16, J. A. 19).

Some eleven months later, however, plaintiff received a letter from Hiram Bingham, Chairman of the Loyalty

Review Board of the Civil Service Commission, informing him that his case was to be reopened a second time, in this instance to permit the Commission's Loyalty Board to conduct a "post-audit" of the action of the Agency Board, " 'hold a hearing and reach its own decision' " (Cplt., Para. 17, J. A. 6; Ans., Para. 17, J. A. 19). It was this third proceeding, instituted after more than four years of investigation, hearing and consideration of the matter and after two favorable decisions by the Agency's own Board, which resulted in the dismissal at issue in this case.

The panel of the Loyalty Board, composed of defendants Amen, Hessey and King, convened in New Haven on May 12, 1953 (Cplt., Para. 18, J. A. 6; Ans., Para. 18, J. A. 19). The defendants allege that:

> "at the hearing before the panel of the Loyalty Review Board the only evidence or testimony adduced was that adduced by counsel for plaintiff; that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to plaintiff; that the identity of one or more of such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath" (Ans., Para. 20, J. A. 20).

The Board also declined the request of plaintiff's counsel to reveal the identity of the confidential informant in the one instance where the informant's identity was known to the Board (Ans., Para. 21, J. A. 20). The Chairman stated that "the panel would consider evidence given by confidential informants not disclosed to the plaintiff" (Ans., Para. 22, J. A. 20).

When he took the stand, Dr. Peters again began by affirming his complete and unswerving loyalty to the United States. He testified categorically that he had never been a communist (Cplt., Para. 23, J.A. 7; Ans., Para. 23, J. A. 20-21).

Five witnesses supported his statement. Two were former medical students. The other three were Charles

W. Seymour, ex-President of Yale University, Judge Charles E. Clark of the Court of Appeals for the Second Circuit, and C. M. Hugh Long, former Dean of the Yale Medical School. All testified to their firm belief in Peters' loyalty (Cplt., Para. 24, J. A. 7-8; Ans., Para. 24, J. A. 21).

In sum, all the evidence adduced at the hearing was the favorable evidence adduced by plaintiff, and the Board had only secret statements by unsworn, unidentified informants to base an adverse finding. As the defendants affirmatively state in their answer,

> "Defendants allege that at the hearing before the panel of the Loyalty Review Board no evidence was adduced except that adduced by counsel for plaintiff, but allege that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for the plaintiff" (Ans., Para. 25, J. A. 21).

On this record, the Board made its decision that there was a reasonable doubt as to petitioner's loyalty to the Government of the United States. It notified petitioner that he was barred from government service for three years and the Civil Service Commission issued an order to that effect (Cplt., Para. 26, J. A. 8; Ans., Para. 26, J. A. 26). Acting on the Board's recommendation, the Surgeon General discharged Dr. Peters on June 12, 1953 (Cplt., Para. 27, J. A. 8; Ans., Para. 27, J. A. 21). Peters' counsel was not permitted to file a motion for hearing before the full Loyalty Board of the Civil Service Commission (Cplt., Para. 28, J. A. 8-9; Ans., Para. 28, J. A. 22).

Thus, all administrative remedies exhausted, petitioner instituted the present action. His complaint asked for a declaratory judgment that the separation from government service and declaration of ineligibility were invalid and for relief from the said declaration (J. A. 13-14). Following the government's answer, both parties filed cross motions for judgment on the pleadings (J. A. 23-25). Both admitted that the issues in the case were controlled

by *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), affirmed *per curiam*, 341 U.S. 918. The District Court granted the defendants' motion and denied the plaintiff's (J. A. 25). The Court of Appeals *per curiam*, by a 2-1 vote, affirmed because, as it said, "[w]e feel obliged to follow the ruling in [*Bailey*] in the determination of the present case" (Appendix B). Judge Edgerton dissented from the judgment on the grounds stated in his dissent in *Bailey* (Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

The issue is precisely that presented in *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), affirmed in this Court by an equally divided vote, 341 U.S. 918. The material facts are parallel with *Bailey*: An eminent physician and medical teacher is employed by the government as a consultant. After more than four years of service in an entirely non-sensitive field, he is charged, among other things, with membership in the Communist Party. At the so-called hearing on this issue, the only evidence submitted is his own and that of favorable witnesses. On the face of the record, it is clear that he is loyal to the United States. The Board, however, has been informed that certain persons, whom they have never seen, told members of the government's investigative police that this employee is disloyal. The statements of the informers were not under oath. The identity of the informers is not revealed to the plaintiff. The informers are not produced and the identity of all but one is unknown to the Board. Relying on their statements, the Board formally finds the plaintiff of doubtful loyalty, relieves him of his position and orders him disqualified from government service.

The issue in this case is not Dr. Peters' "right to a job." It is not the power of the government to protect the security of sensitive agencies like the Atomic Energy Commission or the Department of Defense, for Dr. Peters' job had nothing to do with high policy or state secrets.

The issue is solely the use of star chamber methods to impose on non-sensitive employees the stigma of a dishonorable discharge and disqualification from government service.

The procedure by which the Board relied on secret, unsworn statements against Dr Peters presents important legal and constitutional questions which have not been but should be decided by this Court. The necessity for review and decision now is amply demonstrated by the division of the court below in this case, in *Bailey* v. *Richardson*, *supra*, and the grant of certiorari together with the inability of this Court to resolve the issue three years ago in *Bailey*.

a. Petitioner's Removal and Disqualification Were Not Effected in Accordance With the Provisions of Executive Order 9835.

The separation and disqualification here were effected under the provisions of Executive Order 9835, promulgated May 21, 1947, 12 F.R. 1935, as amended by Executive Order 10241, April 30, 1951, 16 F.R. 3690 (Appendix A, *infra*).[2] It is petitioner's first contention that the proceedings culminating in his dismissal from government service on grounds of disloyalty were not in compliance with the Order.

Part II, Section 4 of the Order specifically guarantees a "right of hearing." Section 2.a. of the same Part states that the procedure is to be that of an "administrative hearing." Part V, Section 1, requires that the determination be made "on all the evidence".

This was a sham hearing. Throughout the three days of the two hearings no witness appeared in opposition to the petitioner's claim of loyalty. No evidence was introduced that supported an inference of disloyalty. A bare

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[2] Executive Order 9835 was subsequently superseded by Executive Order 10450, promulgated April 27, 1953 and amended by Executive Order No. 10491, promulgated October 15, 1953.

right to testify does not satisfy the standard of an "administrative hearing" established by the Order. Nor can the term "evidence" include secret reports from person unknown to the Board.

The government does not controvert the factual allegations on these points contained in the complaint. It admits the receipt of unidentified allegations, the failure to present the unfavorable witnesses for cross-examination, and the reliance by the Board on their secret, unsworn statements. But it contends that such a procedure is exactly what the Order contemplates. We disagree.

Whatever the shortcomings of the Loyalty Program established by Executive Order 9835, and the difficulty of administering its standard of guilt, it was never intended to permit this. Individual rights and reputations are at stake, as the authors of the Order well knew. In its preamble it distinctly states:

> "Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the rank of its employees, and *equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government*" (Emphasis supplied).

The Order itself requires notice, hearing and a decision made "on all the evidence." These requirements cannot be construed as mere facade.

The lower Court in the *Bailey* case, and the Loyalty Board here, construed the Order, however, in a fashion which granted the employee no protection whatsoever. They held, in effect, that the words "maximum protection" of the Government, "equal protection" to the employee, and the words "on all the evidence" are satisfied even if the so-called evidence to support a finding of disloyalty was secret information not under oath supplied by informants unknown even to the Board. The provision for a "hearing" means under this construction that the employee may testify without knowing the crucial information

against him and without being given any real guide or clue as to how he may meet it. Thus, where the Order said that the employee was to retain the equal of "maximum protection," it did not mean maximum protection; that when it said "evidence" it did not mean evidence; that when it said "hearing" it did not mean hearing in the traditional American sense. Such an interpretation flies in the face of the plain meaning of the words used; it permits, as here, a departure from normal and accepted procedure and standards of fairness in an area of great consequence and should not be accepted without review by this Court.

II. Petitioner's Removal and Disqualification Were Effected Through Proceedings Which Violated the Constitution.

If the Executive Order did authorize the proceedings in the instant case, then the Order and petitioner's removal under it violated the Constitution of the United States.

1. Petitioner here was condemned and excluded from government service on the basis of secret information. This action was in violation of the due process clause of the Fifth Amendment (Appendix A, *infra*). The injury asserted is precisely that so recently recognized by this Court in *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'"

Where such exclusion is effected in violation of the requirements of the Fifth Amendment, the Constitution provides relief:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

See also *Hebert* v. *Louisiana*, 272 U.S. 312, 316-7. The entire procedure here, involving the use of secret statements as a basis for a finding of disloyalty to the United States and disqualification from serving its government, was "patently arbitrary", *Wieman* v. *Updegraff*, *supra*.

Plaintiff swore he was not a communist; the Board found him disloyal by relying on unsworn, second-hand statements to the FBI. It never saw his accusers or permitted them to be cross-examined. In terms of "due process of law" nothing could be more arbitrary. Black, Frankfurter, Douglas and Jackson, JJ. discussed such a procedure for exclusion of individual employees from government service in their opinions in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142, 149, 174, 183. We think these opinions demonstrate that the hearing here was arbitrary and in violation of the due process clause of the Fifth Amendment and we rely on them. See also Judge Edgerton's dissenting opinion in the Court of Appeals in *Bailey* v. *Richardson*, *supra*, 182 F. 2d at 66.

2. Disqualification from government service without a proper hearing as here imposed constitutes a bill of attainder, forbidden by Article I, Section 9, Clause 3 of the Constitution (Appendix A, *infra*). Petitioner has been declared unqualifiedly ineligible for even a non-sensitive position. In sum, the government has proclaimed him "disloyal" to all that the United States stands for. It has stigmatized him before his friends and his profession. Clearly he has been "attainted" and penalized in violation of the constitutional provision. See *United States* v. *Lovett*, 328 U.S. 303; *Cf. Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142 et seq. (concurring opinion of Mr. Justice Black).

* * *

The methods employed here are as dangerous to our institutions as they would be if used to obtain criminal convictions. The loyalty program under which Peters' exclu-

sion was effected, for the first time in our history all
the Government to condemn and brand its citizens
secret evidence. By its formal provisions for "notic
"evidence", and "hearing", it is a device for drawing
the public acclaim and Congressional favor which, perh
rightly, is accorded security-minded officials. In no
does it aid the hunt for truly dangerous employees; de
tion and discharge without comment are entirely poss
in such cases. But so long as the zeal of departme
executives in the public interest is measured by the num
of employees they brand and dismiss, this procedure
mits and indeed tempts such executives to sanction use
rumor, falsehood and hearsay to condemn.

Such a procedural development presents issues of pa
mount public importance. They were raised but not
tled in the *Bailey* case where the identical procedure
affirmed by an equally divided vote of this Court afte
division in the lower court. The procedure followed
this case permits an administrative agency to set u
blacklist for all Government employees whom it consid
disloyal and to compel all departments to follow t
practice. One may wonder whether the dangers of C
munist infiltration in a department like Public Hea
justifies a blacklist. But that is not the question bef
this Court. Here the administrative agency demands
right to establish its blacklist without giving the bla
listed employee the safeguards of a fair administra
hearing. By considering unsworn secret evidence fr
informants it has never examined nor seen it exerci
arbitrary power over the career of any individual in
government service. Such procedure presents a quest
of fundamental importance to the Government of
United States and our democratic way of life.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD, FORTAS & PORTER

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APPENDIX A

Regulation and Constitutional Provisions Involved

Executive Order No. 9835, March 21, 1947, 12 F.R. 1935, as amended by Executive Order No. 10241, April 30, 1951, 16 F.R. 3690

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

* * *

PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally respon-

sible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time. (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appeal before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

* * *

PART IV—SECURITY MEASURES IN INVESTIGATIONS

* * * *

PART V—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.*

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

---

* Before being amended by Executive Order 10241, this paragraph of Executive Order 9835 read:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Except for the recited change, which is not central to the issues of this case, the Order is identical to that involved in *Bailey* v. *Richardson*, *supra*.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement or group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of facts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

* * *

ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES

No Bill of Attainder or ex post facto Law shall be passed.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,246

JOHN P. PETERS, *Appellant*,

v.

OVETA CULP HOBBY, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Miller, and Prettyman, Circuit Judges.

Judgment

The above-entitled case came on for consideration on the record on appeal from the United States District Court for the District of Columbia, on appellant's motion to enter judgment on the merits without formal briefs or argument and on appellees' reply thereto, and on the stipulation of the parties filed herein August 3, 1954. The parties agree that the case presents the same issue decided by this Court in Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F. 2d 46 (D.C. Cir. 1950). The Supreme Court affirmed the judgment of this Court therein by an equally divided Court, Bailey v. Richardson, 341 U.S. 918. We feel obliged to follow the ruling in that case in the determination of the present case.

ON CONSIDERATION WHEREOF, It is ORDERED by this Court that appellant's motion for the entry of judgment on the merits in this case without formal briefs or argument be, and it is hereby, granted, and it is FURTHER ORDERED and ADJUDGED by this Court that the judgment of the United States District Court for the District of Columbia on appeal herein be, and it is hereby, affirmed.

Dated: August 5, 1954

Per Curiam

Edgerton, Circuit Judge, concurs in granting appellant's motion but dissents, for the reasons stated in his dissent in Bailey v. Richardson, from the judgment of affirmance.

United States Court of Appeals
For the
District of Columbia Circuit

FILED Aug. 5, 1954

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Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, ET AL., *Respondents*.

PETITIONER'S REPLY MEMORANDUM

The Government's Memorandum in Opposition states that "the constitutional issues which petitioner seeks to raise in this case are identical to those decided in the *Bailey* case" (Memorandum 2). And it admits that the Court "may wish again to examine the personnel security measures atilized in the Executive branch" in view of the even division of the Court in *Bailey* (*Ibid.*) Its suggestion that this case is inappropriate for that purpose is without merit.

1. The fact that Executive Order 9835, under which the challenged discharge took place, has been superseded by Executive Order 10450, has no effect on the importance of the procedural question presented here—whether a federal employee may be discharged, blacklisted and

branded on the basis of secret information against him. Until the Government is prepared to say (which it cannot) that it no longer follows this practice in its program of "personnel security", this question is just as important now as when it was presented to the Court in *Bailey*.[1]

Furthermore, even if the Orders were procedurally different (and the Government has only pointed to the substantive broadening of the grounds for discharge), the repeal of 9835 would not, of itself, make this case inappropriate for review. The Court has already indicated in *Bailey* that the question is important; indeed, four justices were ready to hold that petitioner there had been discharged in violation of the Constitution. Surely, where a man is penalized under an unconstitutional statute, that action does not become unimportant by the mere fact that the statute is repealed shortly thereafter.

2. The Government also brings the Court's attention to the fact that petitioner was not in the classified civil service.[2] It does not say that civil service employees might be able to claim some specialized protection against the use of derogatory secret information arising from particular civil service regulations or legislation.

---

[1] See Statement of Assistant Secretary of Navy Smith, indicating that the Navy intended to continue to rely on secret informants, despite the fact that their unreliability had been demonstrated in the Abraham Chasanow proceedings under Executive Order 10450. Washington Post-Times Herald, September 2, 1954, p. 10; New York Herald Tribune, September 2, 1954, p. 1.

[2] The Government argues that petitioner is "different from the *mass* of federal employees" (Memorandum 4; Italics added) because of the fact that he was not in the classified service. At the risk of quarrelling over numbers, we might point out that of the 2,344,383, paid civilian employees in the executive branch of the Federal Government on June 30, 1953, only 1,014,017—or 43% of them—were covered by the Classification Act of 1949, 5 U.S.C. §§ 1071 *et seq.*, 63 Stat. 964, as amended. *Pay Structure of the Federal Civil Service*, June 30, 1953, Civil Service Commission Pamphlet 33-5, p. 19 (September 1954).

In any case, this is beside the point. The Government's constitutional power is identical, regardless of the technical status of the employee. Petitioner in the *Bailey* case was similarly unclassified.[3] The issue here is a constitutional one—the power of the Government to adopt arbitrary procedures for the discharge of federal employees; had petitioner been in the classified service his argument would be the same.

The Government also adds that petitioner's term of appointment has now run. It does not refer to the fact, however, that he is presently prohibited by the very order challenged from applying for a Government position *"for a period of three years from May 18, 1953"* (Ans., Para. 29, J.A. 22; Italics added).

Respectfully submitted,

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[3] Indeed, the very stipulation quoted by the Government as to petitioner's status was made at the request of Judge Prettyman of the Court of Appeals below. Its purpose was to establish that this case and *Bailey* were substantially identical and not complicated by special civil service legislation or regulations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, ET AL., *Respondents*.

BRIEF OF PETITIONER

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IN THE

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OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner,*

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BRIEF OF PETITIONER

OPINIONS BELOW

The District Court wrote no opinion (R. 25). The judgment of the Court of Appeals, setting out the basis for its determination of the case (R. 28), is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered on August 5, 1954 (R. 28). The Petition for Certiorari was filed on September 29, 1954. Certiorari was granted on November 15, 1954 (R. 29).

THE REGULATION AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Executive Order 9835, 12 F.R. 1935, March 21, 1947 (5 U.S.C. [Cumm. Supp.] following Section 631), as amended by Executive Order 10241, 16 F.R. 3690, April 30, 1951, and Article I, Section 9, Clause 3 and the Fifth Amendment to the Constitution of the United States. Their texts are set forth below in the Appendix to this Brief.

QUESTION PRESENTED

This case presents the same question presented but decided only by an equally divided court in *Bailey* v. *Richardson,* 341 U. S. 918:

Whether, following a loyalty board hearing which produced only favorable evidence, a person may be adjudged ineligible for government service and dismissed from non-sensitive federal employment as a result of secret information given by informants who were not under oath, who were not presented at the hearing and whose identities were not disclosed to the employee.

STATEMENT OF THE CASE

The case comes to this Court from the affirmance of a judgment on the pleadings for defendants in the trial court. Neither party introduced testimony or documentary evidence below. The statement which follows is therefore based solely on the facts pleaded in the complaint and the admissions and allegations of the defendants in their answer.

* * *

John Punnett Peters is an eminent physician and medical teacher. He is Senior Professor of medicine at Yale University (Cplt., Para. 4, R. 3; Ans., Para. 4, R. 15).

For some few years prior to 1951, Dr. Peters had been employed by the Public Health Service of the Federal Se-

curity Agency.[1] Peters served as a Special Consultant, retained to advise directly the Surgeon General. His only work related to proposals to grant federal assistance to medical research projects under the public health laws of the United States. It was non-sensitive. Dr. Peters at no time had access to confidential or strategic information (Cplt., Para. 5, R. 3; Ans., Para. 5, R. 15-16).

It is specifically admitted that "plaintiff was appointed to this position because of his eminence in the field of medical science and his service throughout the period of such employment was of value to the United States" (Ans., Para. 5, R. 16). In January of 1949, however, he received a letter from Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Agency, informing him that information "relating to his loyalty had been received" (Cplt., Para. 6, R. 4; Ans., Para. 6, R. 16). The letter enclosed a detailed interrogatory relating to various of Peters' political activities and requested him to supply the Agency with the information called for therein. Peters completed the form and returned it on January 17, 1949. Shortly thereafter the Board notified him that it had no evidence for holding him disloyal (Cplt., Para. 7, R. 4; Ans., Para. 7, R. 16).

Almost two years later, in December of 1951, however, plaintiff was informed that the Agency was to reconsider the question of his loyalty, this time through a formal hearing before its own Board of Inquiry. Again by letter, this one dated December 17, McElvain wrote him stating formally that some sixteen charges of questionable activity on his part had been noted, including this time, a charge of membership in the Communist Party of the United States (Cplt., Para. 8, R. 4; Ans., Para. 8, R. 17). By letter, Peters again answered the allegations. He cate-

---

[1] The agency has since achieved departmental status. Pursuant to Reorganization Plan No. 1 of 1953 and Public Law 13, 83d Cong., 1st Sess., approved April 1, 1953, 67 Stat. 18, its functions were transferred to the Department of Health, Education and Welfare on April 10, 1953. Defendant Hobby is its Secretary.

gorically stated that he had never been a member of the Communist Party (Cplt., Para. 9, R. 4; Ans., Para. 9, R. 17).

Prior to the hearing, on March 13, 1952, McElvain sent him what purported to be "a written statement of certain information in the possession of said Board." He stated that "certain particular items of such information had been received from confidential informants whose identities were not disclosed by said statement" (Ans., Para. 10, R. 17-18).

The hearing of the Agency Board of Inquiry on Employee Loyalty was held in New Haven on April 1 and 2, 1952. In their answer, the defendants state:

> "The sources of the information as to the facts bearing on the charges against plaintiff were not identified at the hearing or made available to counsel for plaintiff for cross examination. The identity of one or more of the informants furnishing such information, but not of all such informants, was known to the Board. The Chairman stated that the Board did not know whether or not the information given by a confidential informant as to facts bearing on Charge No. 1 against plaintiff had been given under oath." (Ans., Para. 12, R. 18).

Peters adduced the only evidence during the entire two days of the hearing; no witness took the stand against him (Ans., Para. 13, R. 18). Peters swore under oath that he had never been a member of the Communist Party and answered all questions posed him by the Board and its counsel (Ans., Para. 14, R. 19). His testimony as to his loyalty was supported with "affidavits, letters or statements by approximately 40 additional persons" (*Ibid*).

Within two months, on May 23, 1952, McElvain wrote Dr. Peters stating that the Board of Inquiry had determined again that there was no doubt as to his loyalty (Cplt., Para. 16, R. 5-6; Ans., Para. 16, R. 19).

Some eleven months later, however, plaintiff received a letter from Hiram Bingham, Chairman of the Loyalty

Review Board of the Civil Service Commission, informing him that his case was to be reopened a second time, in this instance to permit the Commission's Loyalty Board to conduct a "post-audit" of the action of the Agency Board, "'hold a hearing and reach its own decision'" (Cplt., Para. 17, R. 6; Ans., Para. 17, R. 19). It was this third proceeding, instituted after more than four years of investigation, hearing and consideration of the matter and after two favorable decisions by the Agency's own Board, which resulted in the dismissal at issue in this case.

The panel of the Loyalty Board, composed of defendants Amen, Hessey and King, convened in New Haven on May 12, 1953 (Cplt., Para. 18, R. 6; Ans., Para. 18, R. 19). The defendants allege that:

> "at the hearing before the panel of the Loyalty Review Board the only evidence or testimony adduced was that adduced by counsel for plaintiff; that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to plaintiff; that the identity of one or more of such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath" (Ans., Para. 20, R. 20).

The Board also declined the request of plaintiff's counsel to reveal the identity of the confidential informant in the one instance where the informant's identity was known to the Board (Ans., Para. 21, R. 20). The Chairman stated that "the panel would consider evidence given by confidential informants not disclosed to the plaintiff" (Ans., Para. 22, R. 20).

When he took the stand, Dr. Peters again began by affirming his complete and unswerving loyalty to the United States. He testified categorically that he had never been a Communist (Cplt., Para. 23, R. 7; Ans., Para. 23, R. 20-21).

Five witnesses supported his statement. Two were former medical students. The other three were Charles

W. Seymour, ex-President of Yale University, Judge Charles E. Clark of the Court of Appeals for the Second Circuit, and C. M. Hugh Long, former Dean of the Yale Medical School. All testified to their firm belief in Peters' loyalty (Cplt., Para. 24, R. 7-8; Ans., Para. 24, R. 21).

In sum, all the evidence adduced at the hearing was the favorable evidence adduced by plaintiff, and the Board had only secret statements by unsworn, unidentified informants on which to base an adverse finding. As the defendants affirmatively state in their answer,

> "Defendants allege that at the hearing before the panel of the Loyalty Review Board no evidence was adduced except that adduced by counsel for plaintiff, but allege that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for the plaintiff." (Ans., Para. 25, R. 21).

On this record, the Board made its decision that there was a reasonable doubt as to petitioner's loyalty to the Government of the United States. It notified petitioner that he was barred from government service for three years and the Civil Service Commission issued an order to that effect (Cplt., Para. 26, R. 8; Ans., Para. 26, R. 26). Acting on the Board's recommendation, the Surgeon General discharged Dr. Peters on June 12, 1953 (Cplt., Para. 27, R. 8; Ans., Para. 27, R. 21). Peters' counsel was not permitted to file a motion for hearing before the full Loyalty Board of the Civil Service Commission (Cplt., Para. 28, R. 8-9; Ans., Para. 28, R. 22).

Thus, all administrative remedies exhausted, petitioner instituted the present action. His complaint asked for a declaratory judgment that the separation from government service and declaration of ineligibility were invalid and for relief from the said declaration (R. 13-14). Following the Government's answer, both parties filed cross motions for judgment on the pleadings (R. 23-25). Both admitted that the issues in the case were controlled

by *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), affirmed *per curiam*, 341 U.S. 918. The District Court granted the defendants' motion and denied the plaintiff's (R. 25). The Court of Appeals *per curiam*, by a 2-1 vote, affirmed because, as it said, "[w]e feel obliged to follow the ruling in [*Bailey*] in the determination of the present case." (R. 28). Judge Edgerton dissented from the judgment on the grounds stated in his dissent in *Bailey* (*Ibid.*)

ARGUMENT

Three years have gone by since the validity of the procedure which we attack here was affirmed by an equally divided vote of this Court in *Bailey* v. *Richardson*, 341 U.S. 918. The arguments which we make now, therefore, have already been heard. These same arguments were presented by the petitioner in the *Bailey* case and were rejected by an evenly divided Court. We think the three years of experience with the loyalty program since the *Bailey* case have shown what could not be accurately determined at that time, to wit, the punitive character of this procedure and its lack of connection with actual national security.

We are now able to do what was impossible at the time of the *Bailey* case and that is to assess the consequences of this procedure after three years of trial. By observing the effect which the abandonment of due process in trials of this kind has had on the careers and morale of government workers we can reappraise the validity of the opinion of the Court of Appeals that this kind of procedure can be justified as a protection of national security. When we argued the *Bailey* case our two principal contentions were:

(1) That the President's Order designating proceedings before the loyalty board as an administrative hearing and declaring that the findings should be on all the evidence

could not be construed to authorize a decision based on secret information.

(2) That if the Order were construed so as to permit such action, it would be in violation of due process.

At the time that the *Bailey* case was heard the loyalty program was in its infancy. It had been instituted for the stated purpose of protecting both the Government and the accused employee. In that case the petitioner was challenging one of the earliest actions under that program —her removal from federal service because of a finding of disloyalty which had been based on derogatory information not disclosed to her. The petitioner there argued that adequate power existed for summary discharge of employees where the national security was believed to be involved. She argued that where adverse findings on the issue of loyalty were made against an employee by a hearing procedure, due process required a fair hearing in the accepted sense.

The Solicitor General in brief and argument informed this Court that this procedure of using undisclosed derogatory information as a basis for a determination of disloyalty was at the very heart of President Truman's loyalty program. It was further argued by the Government that no punishment was involved within the terms of the Constitution when an employee was severed from his position, that the hardship of discharge under a finding of disloyalty was not a penalty in the constitutional sense. The unfairness of the procedure was said not to be a major hazard since the boards could be trusted not to use it except where it was essential to national security. On the basis of these assertions, it could then have been assumed that this procedure would not be invoked to punish but only to protect.

Under these circumstances, reasonable men might well have thought it a dangerous adventure for this Court to disregard the warning of the Government that the pro-

cedure was essential to national security, and to strike down this procedure as generally unfair to government employees before experience had shown how it was to be used.

But today we can look at this procedure with the benefit of hindsight. The arguments formerly used to support its constitutionality have been proved by the passage of time to be invalid. A principal argument of the Court of Appeals was that it was necessary to give the executive the power to make findings of disloyalty because otherwise it would not be free "to choose employees for executive duty" and "to remove those deemed not qualified", 182 F. 2d at 58. The Court of Appeals justified the making of the finding in the *Bailey* case on the ground that

> "No function is more completely internal to a branch of government than the selection and retention or dismissal of its employees". Ibid.

The majority argued that if such findings were interfered with by the court the executive might lose control over selection, retention and dismissal. They thought the finding of disloyalty a necessary incident to the power to discharge unfit persons.

The majority judges of the Court of Appeals in the *Bailey* case conceded that the procedure of making findings on secret evidence did not satisfy the requirements of judicial process. They argued that such process was not necessary because the power to remove Government employees was not limited in any way by the Constitution. We do not think they intended to hold that any sort of punishment could be meted out without a full hearing by the executive. They simply did not regard the finding of disloyalty as punishment. They said:

> "If dismissal from the classified civil service requires judicial process, all the cases noted in the footnote below, and many others, were erroneously decided, because they all upheld dismissal without such procedure." 182 F. 2d at 56.

In other words, the Court of Appeals believed that there was no difference between a discharge accompanied by findings of disloyalty and a discharge for inefficiency.

We think that the last three years have demonstrated beyond a doubt the vast difference between the two types of discharge. The one has become clearly a punishment, the other still remains only a hardship. We of course concede that the Constitution does not limit the power of the executive summarily to terminate employment on secret information or for any other reason. The question before this Court is only whether the Government has the right to accompany a discharge with a finding of disloyalty which ruins the reputation and career of the accused, without a full hearing.

The Court of Appeals' opinion in the *Bailey* case can be justified only if a finding of disloyalty is held not to be a punishment. It can be so held only if the finding is essential to the Executive's selection of its employees or else is so closely tied up with the national security that it can be said to be vital to the safe administration of a government agency. The passage of three years has shown that the finding promotes neither purpose.

So far as retention and control over personnel of an agency is concerned the experience of the past three years has shown that it is not only unnecessary, it is even destructive to the power to select and retain. It has made the executive in maintaining its personnel more than ever subject to the pressure of demands from irresponsible sources in Congress. Otherwise the executive might be regarded as soft toward Communism.

Further in this respect the procedure is actually interfering with the retention of employees by the Executive. Every employee knows that if charges are made against him by secret informers he will have no adequate opportunity to defend himself. He is therefore well advised to resign if he thinks there is a chance that some enemy has filled his secret dossier with unfavorable information.

These resignations are filling the papers today. To offer the employee the choice of resigning or staking his career on this procedure is a hazard, not a help, to the internal management of government agencies.

A trial without due process is at best a lottery on which no man should be asked to stake his career and reputation. But this particular lottery is not even a fair gambling device. The insistent and clamorous public demand that Communists be rooted out regardless of the insignificance of their duties loads the game against the employee. The pride that public officials have in disclosing numbers of men discharged for loyalty or security reasons does not instill confidence in their lack of bias in evaluating the contents of a secret dossier. The fact that the board making the decision often does not even see the secret informant or know who he is adds to the risk.

Reasonable men might have differed in 1951 when the *Bailey* case was heard on whether these consequences would follow if the procedure were affirmed. It is difficult for us to believe today that reasonable men can differ on whether these things actually have happened.

Experience with this procedure has also proved that the second justification for abandoning due process, i.e., that it is connected with national security, is equally invalid. The complete and utter lack of any connection with national security in the use of this procedure is dramatically illustrated by this case. So far as national security is concerned there was no necessity of trying Dr. Peters for anything. He spent only about ten days a year in Washington consulting in the Surgeon General's office. We can safely assume that he would not during such a short period have been able to convert his fellow doctors to Communism. But if it had been thought he was a danger, all the Department of Health, Education and Welfare would have had to do was to instruct the Surgeon General not to call him down for consultation any more. He was costing the Government nothing while he stayed at Yale. His appoint-

ment was about to expire and the Department could have let it expire without ever seeing him again.

Why then was it necessary so far as security was concerned to condemn him as disloyal without due process? The only possible reason for his trial by these methods is that it is apparent that Dr. Peters could not have been convicted by legal evidence. The Government was unable to produce any. From the secret information, the Board apparently was in doubt as to whether he was a Communist. On the basis of this doubt, it punished him. Certainly it was a punishment that the Board was seeking to inflict. Clearly in this case the Board was not trying to protect the Department of Health, Education and Welfare from any danger whatever.

We believe that in the case of *Wieman* v. *Updegraff*, 344 U.S. 183, this Court has taken judicial notice of the developments in the general loyalty program which we have described above. At the time of the *Bailey* case four of the members of this Court must have believed that a finding of disloyalty and a discharge on that ground was not a punishment in the constitutional sense so as to require due process. The Court of Appeals in the *Bailey* case so held. But in *Wieman* v. *Updegraff* a unanimous Court agreed with what we are saying here when it said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'" 344 U.S. at 190-191.

Prior to the *Wieman* case the Court of Appeals in the *Bailey* case had said:

> "In terms the due process clause does not apply to the holding of a Government office." 182 F. 2d at 57.

That statement has been drastically modified in the *Wieman* case in the following language:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192.

We believe that an affirmative pronouncement by this Court that government employees should not be compelled to risk their reputations and careers without due process or a fair hearing would be hailed with relief even by those who are now putting men to trial by these procedures. We do not believe that the men who do this enjoy their tasks. We think they would like to give fairer hearings. But it is politically dangerous so long as this procedure is followed for any government official not to use it. To be more fair to persons suspected of Communism than is necessary under the law might well be branded as softness towards Communism.

That distinguished scientist, Dr. Vannevar Bush, who should certainly know as much as any man in this country about the problems of national security in the field of science, had this to say about the present workings of the program on December 30, 1954:

> "The scientist said the most important objective of 'our enemy' is to 'spread confusion and distrust among us.' But he declared that 'we are carrying on the process now without his prompting.'
>
> "He said the system adopted for persons doing secret work 'seems almost calculated to destroy their reputations by innuendo and charges based on spite.'
>
> "Bush said a principle has been adopted which is 'abhorrent' to American traditions — establishing guilt on the basis of simple association, putting in jeopardy men who did important war work because they express unpopular opinions, and denying men the right to make useful scientific contributions because of 'youthful indiscretions.'

> "Asserting that 'suspicion and distrust are rampant in the land,' he said 'this madness of ours' is much more threatening than the post-World War I 'witch hunts' and is even a greater momentary threat than that of a hostile power overseas.
>
> "'If all people knew the wide extent of the threat—which goes far beyond the few spectacular cases that make the headlines—if they understood how closely it fits into our enemy's design and how successful those designs are proving, then there would be reason to hurry,' Bush declared." The Washington Post and Times Herald, December 31, 1954, p. 1, col. 5

In this speech Dr. Bush was speaking about the program in general, a problem which is not before this Court. However, his statements have a most significant applicability to the process of conviction by secret evidence. Dr. Oppenheimer at least has a public record on which his countless friends can defend him. He at least had a chance before the tribunal which tried him. He faced his accusers. He had the benefit of dissenting opinions. The tribunal itself was put in a position of having to make a public analysis of the evidence.

But in cases like that of petitioner the punishment is inflicted by stealth and the employee may be ruined by mere gossip.

This Court has already said in the *Wieman* case that the Constitution does protect an employee from arbitrary or discriminatory exclusion from government service. That decision compels the reversal of this case unless this Court is prepared to hold that the conviction of a man on evidence which is not disclosed to him is not arbitrary. That we do not believe this or any American court would do.

We emphasize again that we believe no constitutional issue is involved where the Government discharges an employee without an adverse finding against him. A discharge in the discretion of the administrator for no reason or for reasons disclosed or undisclosed which are in the administrator's judgment related to the proper function of his office

raises no constitutional question. So far as the question raised by this case is concerned there would be no objection to a complete repeal of all civil service protection of government employees—to the return of the spoil system with its accompanying unlimited discretion to the executive. Our point is only that where a system is created of discharge and exclusion from government service on the basis of an adverse finding against the employee on the issue of his loyalty arrived at by a proceeding which has the appearance of a trial on the merits, the finding which is the basis of governmental action may not be arbitrarily made. It must be made by a hearing which is in fact a hearing with full opportunity to "test, explain and refute".

I. PETITIONER'S REMOVAL AND DISQUALIFICATION WERE NOT EFFECTED IN ACCORDANCE WITH THE PROVISIONS OF EXECUTIVE ORDER 9835.

The separation and disqualification were ordered—by the Department and the Board, respectively—under the purported authority of Executive Order 9835.[1] This order was promulgated on March 21, 1947.[2]

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[1] Executive Order 9835 is reprinted in full, Appendix.

[2] Prior to the end of World War II, the Civil Service Committee of the House was authorized to make a study of the loyalty of Federal employees. It recommended, in its report, that a commission be established of representatives of the War, Navy, State, Justice and Treasury Departments and of the Civil Service Commission, to propose a security program. Report on H.R. 66, House Committee on Post Office and Civil Service, 80th Cong., 1st Sess. President Truman adopted the recommendation in Executive Order 9806 establishing the President's Temporary Commission on Employee Loyalty. This Commission heard a number of witnesses and made its own report to the President, which he released on March 2, 1947. Its recommendations were largely adopted in the Executive Order establishing the Loyalty Program, cited above.

The history and operation of the Program are extensively surveyed in Bontecou, *The Federal Loyalty-Security Program* (1953).

The Order's preamble stated that the purpose of the program was to grant equal protection to the Government —against infiltration—and to Federal employees—against unjustified charges of disloyalty. Part I provided for the investigation of all applicants for positions, Part II for the investigation of employees. Responsibility for the latter program was lodged with department heads, who were ordered to appoint loyalty boards to hear the cases of accused employees. If the agency board recommended removal, the employee was to enjoy the right to appeal to the Loyalty Review Board of the Civil Service Commission. Part III gave the Civil Service Commission the duty to review such recommendations, to make rules and to advise the departments on all phases of the program. Part IV allowed a department head to request information relating to an employee from the FBI, and gave the FBI the power to withhold names of informers where essential. Part V stated that the standard against which an employee was to be measured was whether or not reasonable grounds existed for a belief of disloyalty. Part II was subsequently amended by Executive Order 10241, April 30, 1951, 16 F.R. 3690, providing the standard would thenceforth be whether there was reasonable doubt as to the employee's loyalty. It was under this standard that Peters was judged, though this fact is immaterial to the issues raised in this case.

The crucial provisions of the Order, for purposes of this case, provided that discharge was to be based on "evidence" developed at a "hearing".

Part II, Section 2.a.:

> "An officer or employee who is charged with being disloyal shall have a *right to an administrative hearing* before a loyalty board in the employing department or agency . . ."

Part II, Section 2.b.:

> "The officer or employee shall be served with a written notice of *such hearing* in sufficient time,

[which shall inform him] (2) of his *right to an administrative hearing* on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit."

Part II, Section 4:

"The *rights of hearing*, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure . . ."

Part V, Section 1. (as amended):

"The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, *on all the evidence*, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

(Italics added in each quotation.)[3]

In finding against petitioner the Board considered secret information undisclosed to him (Ans., Para. 22, R. 20, Para. 25, R. 21). The source of part of that information was not even known to the Board (Ans., Para. 22,

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[3] The program under 9835 came to an end on April 27, 1953, with the issuance of Executive Order 10450, 18 F.R. 2489. This order recites that national security is based on reliable Federal employees and American traditions require fair treatment of such employees. It provides that all applicants for Federal employment be investigated, and that the cases of all existing employees be readjudicated. Where information indicating that retention is not clearly consistent with national security is received, the employee is to be suspended and his case reviewed by the department. Section 8(a) of the Order sets out the information to be developed in this program. The various agencies are required to and have adopted regulations to carry out the program.

R. 20). Such a procedure cannot be considered as an "administrative hearing" in the terms of the Order, nor can such information be included by any stretch of the imagination under the term "evidence". It is a procedure far more consistent with the secret hearings of the Inquisition, or those adopted in the courtmartial of Alfred Dreyfus.[4] This same procedure was held by the President's Commission in Nuremberg in convicting German judges as the "final degradation of the judiciary".[5] We say that the Court must attribute to the Executive Order an intent to provide for a normal hearing on evidence in the traditional sense and to preclude the startling departure from Anglo-American procedure represented by the present case.[6]

II. PETITIONER'S REMOVAL AND DISQUALIFICATION WERE EFFECTED THROUGH PROCEEDINGS WHICH VIOLATED THE CONSTITUTION.

If the Order may be construed as permitting this procedure, then petitioner's removal and disqualification under it violate the Constitution of the United States.

1. *Bill of Attainder:* Disqualification from government service without a proper hearing constitutes a bill of attainder, forbidden by Article I, Section 9, clause 3 of the Constitution (Appendix). Petitioner here has been declared unqualifiedly ineligible for even a non-sensitive position in federal service. In sum, the Government has proclaimed him "disloyal" to all that the United States stands for. It has stigmatized him before his friends and his profession, by an *ad hoc* declaration. Clearly he has been "attainted" and penalized in violation of the

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[4] Dreyfus and Dreyfus, *The Dreyfus Case* (Yale University Press, 1937).

[5] *United States* v. *Joseph Alstoetter* (President's Military Tribunal, Nuremberg, Record available at Library of Congress).

[6] See cases cited and discussed, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 165-172.

constitutional provision. See *United States* v. *Lovett*, 328 U.S. 303, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142 *et seq.* (concurring opinion of Mr. Justice Black).

2. *Due Process:* A hearing without minimal guarantees of fairness, violates the due process provision of the Fifth Amendment of the Constitution (Appendix) when it results in disqualification from government service on avowed grounds of disloyalty.

This was the issue presented in *Bailey* v. *Richardson*, *supra*. The Court of Appeals in that case, by a two to one vote, held that no constitutional right to relief existed on the facts there presented. It held that government employment was not strictly "property", "liberty" or "life". And for this reason it concluded:

> "In terms the due process clause does not apply to the holding of a Government office." 182 F. 2d at 57.

On certiorari to this Court, petitioner pointed out that she was not seeking to limit the right to deny federal employment where the denial is not based on adverse findings. Her challenge was directed solely to the procedure and consequences of discharge in her case based on a finding of disloyalty unsupported by evidence. However, this Court affirmed the Court of Appeals by an equally divided vote.

Since then, the ground on which the Court of Appeals based its holding has been specifically rejected by this Court. We rely on *Wieman* v. *Updegraff*, 344 U.S. 183. In that case, the Court had before it the loyalty oath imposed on public servants of the State of Oklahoma. Appellants put forth the claim that the oath, as interpreted by the Supreme Court of that state, violated the Fifth Amendment in that it required the employee to swear he had not been a member of subversive organizations, irrespective of whether at the time he joined the organization he was aware of its purpose. The Court agreed. It pointed out that the consequence of discharging persons for disloyalty was to inflict on them

"a badge of infamy." The Court then held that the oath arbitrarily classified "innocent with knowing activity". It therefore violated due process. The Court rejected the "facile generalization that there is no constitutionally protected right to public employment" as a technique "to obscure the issue." Id at 191.[7]

The language of the holding is eminently clear:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

Thus, the inquiry here is not whether Peters had a theoretical "right" to his position. It is whether the procedure which resulted in his discharge was "arbitrary". Plainly it is. The point is ably demonstrated in the dissenting opinions of Justices Black, Frankfurter, Douglas and Jackson in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142, 149, 174, and 183, and the dissenting opinion of Judge Edgerton in *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950). The Justices of this Court who voted to affirm in *Bailey* must have done so, not on the ground that the employee had received due process, but because they believed that "[D]ue process does not apply." See Reed, J., dissenting in the *Joint Anti-Fascist* case, 341 U.S. at 212. The view appears to have been qualified in the *Wieman* case, decided in the light of three years experience under such programs.

If the Government insists on discharging and blacklisting its employees in this formal, ostensibly judicial fashion,

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[7] To the same effect, see Burns, *The "Right to a Government Job"*, 6 *Rutgers L. Rev.* 451 (1952). Whether petitioner's position was a right or a privilege is of no moment. It has always been clear that the Government may not even condition a privilege on an unconstitutional requirement. *Frost* v. *Railroad Commission*, 271 U.S. 583; *U. S. ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407; *Perkins* v. *Elg.*, 307 U.S. 325.

then it must grant a hearing which is more than sham. As the Court said in *Morgan* v. *United States*, 304 U.S. 1, 18,

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one."

The Government should not be permitted to have it both ways. It should not be permitted to designate its procedure as a hearing system, to give an aura of credibility to its findings, and at the same time deny the employee the right to know the evidence against him. It is a constitutional principle and plain common sense that "there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." *ICC* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93.

Petitioner was discharged without such an opportunity. Such a discharge is arbitrary. Under the authority of the *Wieman* holding, this case must be reversed as punishment inflicted on petitioner without due process of law.

CONCLUSION

The most fundamental subject of constitutional concern is the life and liberty of the individual. Imprisonment of course does not follow the findings of loyalty boards but the penalties are hardly less severe:—ostracism and impoverishment and the denial of access to one's profession and the society of one's friends. This is a real power over the freedom of individuals who are Government employees. It is exercised by officials and boards who need have no training in the law or familiarity with its principles and who do not desire to proceed in the tradition of the law. These men now claim that the Constitution does not limit their power over our civil servants, because to

do so would make it impossible for them to carry out their duties effectively.

In the late twenties and ea ly thirties a similar constitutional claim was made by a multitude of administrative boards—bureaucratic agencies with vast power over property rights. In their early operations these boards conducted themselves with little regard for the traditional rules of procedure. They frequently took the position that their proceedings and decisions were not subject to review by the courts. There resulted a long and difficult struggle to subordinate these agencies to the rule of law and to compel them to bring their procedures into harmony with the basic requirements of fair play which our traditions of due process demand.

Many qualified people thought that to subject these agencies to procedural restrictions, and their decisions to court review, would make it impossible for them to do their work. They felt that the acute economic emergency required that the administrative process should not be subject to judicial restraint or to the hindrance of procedural due process. "Liberals" were particularly energetic in expressing this opinion. However, the "conservative" view prevailed. The administrative process was subjected to due process requirements, and the result was clearly beneficial. Their performance of assigned functions was not materially impaired, and their procedures and decisions were brought into closer conformity with our traditions of fair play.

We are now confronted with a similar struggle, not as to property rights, but in a vastly more important area: the field of individual freedom. The existence of this struggle, together with its fundamental implications, has been obscured because it arises in the context of our battle with Communism. But we are convinced that the procedure in this case is one that does deal with the freedom of individuals, that it does deprive them of fundamental rights, and that rejection of such procedure by this Court

will vastly aid rather than hamper the true objectives of a security program.

The judgment below should be reversed with directions to grant the relief prayed for in the complaint.

Respectfully submitted,

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APPENDIX

Regulation and Constitutional Provisions Involved

Executive Order No. 9835, March 21, 1947, 12 F.R. 1935, as amended by Executive Order No. 10241, April 30, 1951, 16 F.R. 3690

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

• • •

PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally respon-

sible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time. (2) of his right to an administrative hearing on such charges before a loyalty Board, and (3) of his right to appeal before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

* * *

PART IV—SECURITY MEASURES IN INVESTIGATIONS

* * *

PART V—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.*

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

---

* Before being amended by Executive Order 10241, this paragraph of Executive Order 9835 read:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Except for the recited change, which is not central to the issues of this case, the Order is identical to that involved in *Bailey* v. *Richardson, supra.*

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement or group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of facts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

* * *

ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES

No Bill of Attainder or ex post facto Law shall be passed.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 376

JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

REPLY BRIEF FOR THE PETITIONER

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April 13, 1955.

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IN THE

Supreme Court of the United States

October Term, 1954

No. 376

JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

REPLY BRIEF FOR THE PETITIONER

I.

THE ISSUE

From reading the government's brief one gets the impression that the issue in this case is whether the courts may interfere with the selection and removal of government personnel. The Attorney General appears to think that the elaborate inquisition called the loyalty and security program with its hierarchy of trial and appellate tribunals, with its army of informers, with its periodic announcement of new totals of victims, is an incident of ordinary personnel management and therefore beyond the protection of the Constitution.

It is our position that proceedings under the loyalty program are not a part of routine personnel management;

and further, that the government's power with respect to its personnel is subject to constitutional limitations in certain situations.

Wieman v. *Updegraff*, 344 U. S. 183, establishes the latter point: that the constitution is applicable to the government's power to dismiss employees. *Wieman* holds that the Government may not discharge employees for prohibited reasons—that is, on the basis of arbitrary and "indiscriminate classifications".

The issue in the present case is whether the constitution also applies to the dismissal of an employee for disloyalty, after a formal hearing. The answer to this, we believe, must be in the affirmative. The government may dismiss employees for such reasons as it chooses, limited only by such constitutional considerations as *Wieman* v. *Updegraff* illustrates. But where the reason for dismissal is alleged disloyalty, and where the Government purports to determine disloyalty by means of a formal hearing held pursuant to elaborate regulations, the basic requirements of due process must be observed.[1]

The government does not deny the terrible damage caused by a dismissal for disloyalty (Resp. Br. 57). It seeks, instead, to cramp the issues raised by this case within the narrow principles which govern a routine dismissal. A mass of cases are marshalled to prove that the Constitution does not limit the executive's managerial power to hire and fire (Resp. Br. 31-41). These cases are all beside the point. None involved a formal adjudication of disloyalty to the United States by an administrative board.

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[1] The Attorney General's argument that the executive power over government employees is "plenary", if pressed to its logical conclusion would permit the executive to stigmatize an employee as disloyal without even a limited hearing. Even if we assume that the Government could dismiss employees for disloyalty without a hearing, when the Government provides for an adjudication pursuant to a hearing, it must comply with basic due process requirements. Cf. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (a state may arbitrarily exclude a foreign corporation, but once admitted the corporation must be accorded equal protection).

Never before either in times of war or peace has the government resorted to anything remotely resembling the loyalty program (see pp. 16-17, *infra*). Neither has any such program been adopted by industries which are far closer to national defense than the Department of Health, Education and Welfare. Nor has any labor union sought to protect itself from infiltration of Communists by setting up this kind of a formal inquisition. They have solved their problems with Communists quietly and efficiently without spreading fear and distrust throughout their organizations.

The General Electric Company is a vast organization deeply involved in national defense and in the possession of government secrets. It is a far richer field for Communist exploitation than is the field of public health. In the tumult and shouting that has accompanied the loyalty program the heads of that company found it necessary to reassure their employees that they had no intention of establishing a loyalty program to judge men's qualifications by presenting the testimony of secret informers to boards of prominent citizens selected from Who's Who.[2] General Electric repudiated this notion as a function of management. It said that private employers "cannot and should not be expected to embark privately upon sweeping programs for judging the loyalty of employees" because the "government, not private citizens, must identify traitors—and that this government duty could not safely or properly be left to private citizens." A. A. Berle, Jr., *The 20th Century Capitalist Revolution* 91 (1954).

The truth of these statements is obvious. No rational employer would believe that he could promote efficiency by employing an army of secret informers, by collecting gossip, by staging hearings which precluded any opportunity to explain and refute, thus spreading fear, confusion and suspicion throughout the enterprise.

The basic question in this case, therefore, is not whether

[2] See Resp. Br. 103, fn. 46.

the executive branch of the government can exercise the normal and usual managerial prerogative of discharging employees who are unsuitable without a fair hearing. Of course it can. But the executive department in this case was not engaged in making an ordinary managerial judgment that an individual is unsuitable. It was engaged in making a formal determination that an individual is disloyal to the United States. It was trying and condemning an individual for unworthiness of character. It was adjudicating a status. This is, therefore, not an ordinary dismissal case.

The true issue in this case is whether the government in its quasi-judicial capacity can try and condemn a citizen as disloyal to his country by a formal hearing which has all the appearance of a trial but not its substance, specifically the right to confront and examine one's accusers.

II.

POSITION OF THE PARTIES

It may be helpful at the outset to summarize each party's position with respect to the constitutional provisions in issue.

A. The Government's Position

Due Process

(i) The government contends that nothing in the constitution limits the executive power to appoint and discharge federal employees. It asserts that the power to determine qualifications for federal employment is committed to "executive discretion" and that the courts cannot be called upon to "supervise the action of executive officials" (Resp. Br. 31, 33-34). Proceeding from these principles, the government states that "loyalty to the Government of the United States is a reasonable qualification for public employment" (Resp. Br. 51-52), and that the loyalty program is an appropriate exercise of the executive's power to select qualified personnel which is not limited by the due process clause.

(ii) The government maintains that *Wieman* v. *Updegraff*, 344 U.S. 183, decided only that the executive cannot arbitrarily exclude individuals from government employ "on grounds having no reasonable relationship to the efficiency of the public service" (Resp. Br. 51). The government denies that *Wieman* v. *Updegraff* may properly be construed to require fair procedure in determining qualifications for public office (Resp. Br. 56).

(iii) However, if *Wieman* v. *Updegraff* is read to require fair procedure in connection with a finding of disloyalty, the government claims the requirement was satisfied by the procedure in this case (Resp. Br. 59-70). The government concedes that a procedure which denies "confrontation and cross-examination may, in some circumstances, be 'patently' arbitrary" (Resp. Br. 60). But due process, it asserts, "is a variable concept, to be measured in the light of all surrounding circumstances" (Resp. Br. 59). In determining the procedure required by the Fifth Amendment the court must weigh the "precise nature of the interest that has been adversely affected", it must consider the alternatives available, and it must balance the "hurt complained of and good accomplished" (Resp. Br. 60-61). In this case, protection of the individual interest must yield to national security which, the government maintains, "demands that certain types of information be kept confidential and that the employee be denied confrontation and cross-examination of confidential informants" (Resp. Br. 24).

First Amendment

(iv) The government maintains that "the First Amendment cannot be regarded as placing any limitation on the executive power of removal from Government office" (Resp. Br. 79). It concedes "that, as a practical matter, the Order may have acted as a deterrent to employees in the exercise of First Amendment rights" (Resp. Br. 89). But it claims that such restraint was indirect and remote,

that the test is not whether there is a clear and present danger, and that there was a reasonable basis for the executive judgment underlying the loyalty program (Ibid).

Alternatives

(v) We understand the Attorney General to maintain that there is no alternative to the procedure followed in this case if national security is to be protected against Communist infiltration.

B. Petitioner's Position

Due Process

(i) Petitioner submits that the executive power to establish a loyalty program whereby citizens are tried and condemned as disloyal is subject to the limitations of the due process clause. Petitioner concedes that in the exercise of its managerial power the executive may employ and discharge persons without a hearing which conforms to the requirements of due process. But petitioner contends that the loyalty program is a process of trial and condemnation and is not an exercise of the managerial power.

(ii) Petitioner maintains that *Wieman* v. *Updegraff* held squarely that power over governmental employees is limited by the due process clause. The government's attempted distinction is without merit; arbitrary procedure is just as offensive to due process as the establishment of arbitrary substantive qualifications.

(iii) Petitioner accepts the government's view that due process is an historically evolving concept which requires the court in each case to balance the interests involved and the alternatives available. Petitioner submits that the interest of the accused in his reputation and career and that of the government itself in maintaining decent and civilized procedure requires fidelity to the historic and basic right of confrontation.

First Amendment

(iv) Petitioner contends that the loyalty program abridges the First Amendment by deterring federal employees from freely exercising freedom of speech and freedom of association. Under the loyalty program an individual who expresses unorthodox views may find himself disgraced and ruined merely because he expresses unacceptable views. There is neither clear and present danger nor reasonable necessity to justify so serious a deterrent to the exercise of First Amendment rights by the petitioner or the more than two million federal employees.

Alternatives

(v) The government has available to it numerous alternatives, if it is genuinely concerned with securing trustworthy employees, which do not involve formal adjudications of disloyalty by executive hearing boards.

III.

THE EXECUTIVE HAS NO POWER TO ADJUDGE A CITIZEN TO BE DISLOYAL EXCEPT BY TRADITIONAL DUE PROCESS PROCEDURE

The government in its brief (Resp. Br. 60) takes as the standard to determine whether the Fifth Amendment was violated in this case the explanation given to the due process clause by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163:

> "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
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> • • •
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> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to

> the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

The government has chosen this as the standard most applicable to this case and we accept it as such. What then are the interests affected by the procedure in this case? What were the available alternatives to the procedure that was followed?

A. The Interests Involved

The first interest affected is that of the accused in his good name and in his capacity to earn a livelihood. Persons who are discharged on grounds of loyalty, in the words of Seth Richardson, the former Chairman of the Loyalty Review Board, are "ruined everywhere and forever."[3] The reputation of such persons is stained indelibly. The loss of the government job is incidental. Hardship may be a consequence of loss of employment, but not disgrace or infamy. Such persons may wander through the community from employer to employer, always to be told that no employment is available because of some unspecified charge by some unnamed individual who cannot be revealed.[4]

The second interest affected is that of the government itself. Much more is involved in this case than the good name of Dr. John Punnett Peters. The government itself has a deep and immeasurable interest in fair procedure. The opinion of Mr. Justice Frankfurter in *Joint*

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[3] Quoted in Bontecou, *The Federal Loyalty-Security Program* 65 (1953).

[4] An executive of the Douglas Aircraft Company recently told a Senate Committee that his firm would not employ a person in any position, sensitive or non-sensitive, who had been denied a security clearance. Hearings Before Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21, 84th Cong. 1st Sess., p. 779 (March 14, 1955) [stenographic transcript].

Anti-Fascist Refugee Committee v. *McGrath, supra,* upon which the government relies, speaks of the "feeling, so important to a popular government, that justice has been done." 341 U.S. at 172. That opinion quoted Daniel Webster's statement that " 'In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done'." (Ibid). It referred to the opinion of Lord Chief Justice Goddard in *Rex* v. *Bodmin J. J.*, [1947] 1 K.B. 321, 325, in which the court quashed a conviction where a witness had been interrogated in the absence of the defendant, saying that "Time and again this Court has said that justice must not only be done but must manifestly be seen to be done."[5] The procedure followed in this case does violence to this principle.

There are practical as well as moral considerations which forbid the executive to degrade the institution of trial by due process. The suppression of unorthodox thought among public servants is profoundly serious. Sound government policy results from the free play of ideas and the frank interchange of opinion without fear of reprisal years later when circumstances have changed. The effectiveness and morale of all government employees are immeasurably damaged by the realization that their reputations and careers may be at the mercy of psychopathic liars, ignorant busybodies, and malicious talebearers who are shielded from exposure by cross-examination.[6]

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[5] A related thought is reflected in Justice Holmes' oft-quoted dissent in *Olmstead* v. *United States*, 277 U.S. 438, 469: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part." Cf. *Woodruff* v. *Trapnall*, 10 How. 190, 207: "We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals."

[6] The "depressing effects upon morale" of government employees caused by the loyalty and security programs were noted by the Hoover Commission:

> "The handling of security cases has been such as to lead to very general views within the service that determinations are

The Attorney General insists, however, that the interest of national security is so overriding as to justify jettisoning fundamental procedural rights. He claims that national security requires protection of paid and unpaid informers,[7] and that the usefulness of such persons will be ended and secrets disclosed if confrontation and cross-examination are held to be required by the Constitution (Resp. Br. 104-106). The Attorney General does not document the assertion that the nation's security will be endangered by fair procedure in cases involving governmental employees. Other persons who have occupied high government position and who are more objectively acquainted with the problems of loyalty and security, disagree with the Attorney General that confrontation and cross-examination will impair the nation's safety.[8] See

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not sufficiently judicial in character (spirit being as important as procedure) to make for valid decisions. There is fear that honest and loyal employees can be destroyed by unsupported or trivial derogatory charges; there is fear that security authorities can be stampeded; and there is fear that security charges are at times a means of making 'political' removals.'' Commission on Organization of the Executive Branch of the Government, *Task Force Report on Personnel and Civil Service* 121 (Feb. 1955).

A recent report to the American Orthopsychiatric Association stressed the damage to mental health caused by unspecified charges by nameless informants. N. Y. Times, March 3, 1955, p. 11, col. 1.

[7] See Matusow, *False Witness* (1955). This admitted perjurer was once a paid informer. How many like him are concealed by the system which the Attorney General defends in this case?

[8] The late Justice Jackson, who as a former Attorney General was familiar with the problems confronting the executive, condemned the use of secret testimony in these words: ''In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.'' *U. S. ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (dissenting opinion).

e.g., statements of Dr. Vannevar Bush, formerly Director of the Office of Scientific Research and Development, quoted in Brief of Petitioner 13; Harry P. Cain, member of Subversive Activities Control Board, Address to Conference on Civil Liberties, reprinted in 101 Cong. Rec. 2683-2691 (March 18, 1955) (unbound).[9]

In any event, apart from the provision of Article 1, Section 9 authorizing the suspension of the privilege of the writ of habeas corpus "when in cases of Rebellion or invasion the public safety may require it", the Constitution does not sanction the suspension of its provisions in time of alleged emergency. Even the war power, which is virtually without "qualification or limitation", *United States* v. *MacIntosh*, 283 U.S. 605, 622-23, has been held "subject to applicable constitutional limitations", and specifically to the due process clause. *Hamilton* v. *Kentucky Distilleries Warehouse Co.*, 251 U.S. 146. The government unsuccessfully sought to defend the President's seizure of the steel plants as "necessary to avert a national catastrophe". *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 582. Surely, our free institutions are not in such peril as to warrant abandonment of our historic ideal of a fair hearing. Fair procedure will not prevent the Government from detecting wrongdoers among its employees or from safeguarding the nation's security.

B. The Alternatives

One of the factors the Attorney General asks the court to weigh in determining due process here is whether there is an alternative to the procedure adopted by the government. The Attorney General implies that there is none

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[9] Rep. Martin Dies, formerly Chairman of the House Un-American Activities Committee, stated after defending an employee accused of disloyalty: "I know the accused ought to be confronted with witnesses. . . . [The proceeding] frightened me, because it seemed so contrary to what I always believed was fundamental American fair play." *The Washington Daily News*, March 21, 1955, p. 5, col. 1.

consistent with national security. If so then our great corporations, our essential public utilities, our whole defense effort is in imminent danger. Our army is particularly vulnerable because the executive has not yet deemed the use of secret unsworn testimony to be necessary in giving dishonorable discharges to the persons most directly involved with security—the military. The executive regulation implementing the Uniform Code of Military Justice guarantees confrontation and cross-examination in court martial proceedings.[10] See Gardner, *Bailey* v. *Richardson and The Constitution of the United States*, 33 Boston U. L. Rev. 176, 193-197 (1953). Indeed, the procedure followed in this case has not been deemed necessary by the government even in time of war. See p. 17, *infra.*

The punitive character of the loyalty program and its utter lack of rational connection with either security or personnel management is dramatically illustrated by this case. There was no necessity in the interest of national security to brand Dr. Peters as disloyal. This distinguished physician and scholar was not engaged in sensitive work. He was merely a consultant to the Surgeon General in connection with proposals to grant federal assistance to medical research institutions under the Public Health Laws (R. 3). Dr. Peters' duties required his presence in Washington for only four to ten days each year (R. 15). He was sent notice of his separation from the govern-

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[10] The Uniform Code of Military Justice provides in relevant part that "no officer shall be dismissed from any of the armed forces except by sentence of a general court martial * * *." 50 U.S.C. § 739. The President was authorized by Congress to prescribe "[t]he procedure, including modes of proof, in cases before courts-martial * * * which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." 50 U.S.C. § 611(a). By E.O. 10214, 16 Fed. Reg. 1303 (1951), the President prescribed the 'Manual for Courts Martial, United States, 1951'." The Manual (Section 139) forbids the use of testimony which is not "sworn and subject to cross-examination, the scrutiny of the court and confrontation by the accused."

ment service on June 12, 1953 (R. 21), about six months before the expiration of his term on December 31, 1953 (R. 16). It would have been a simple matter for the government not to call him to Washington for consultation and not to renew his appointment when it expired. Even the excuse of saving the government money is lacking; Dr. Peters was not on the payroll. And yet the government claims that there was no alternative if America is to be secure except to brand Petitioner.[11]

Plain common sense tells us that there are plenty of alternatives if the Government is genuinely concerned with safeguarding security while also protecting individual rights. The executive could follow the practice successfully employed in England where persons who are regarded as security risks are transferred from sensitive to non-sensitive positions. Bontecou, *op. cit. supra* note 3, at 271.[12] The government could also summarily dismiss without a hearing persons it deems untrustworthy in order to "promote the efficiency" of the service. Civil Service Act, 37 Stat. 522, as amended, 62 Stat. 354, 5 U.S.C. § 652

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[11] Applying the rule that statutes which curtail individual rights should be "narrowly drawn", *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 311; *Thornhill* v. *Alabama*, 310 U.S. 88, 105, the Government was required to follow the alternative that would entail minimum damage to Petitioner.

[12] The government in its brief describes at length the measures taken by the British government (Resp. Br. 65-67, fn. 18). But the government omits the most significant fact, namely that the British program is limited to persons " 'employed in connection with work the nature of which is vital to the security of the state', or, in current jargon, 'top secret' material." Bontecou, *op. cit supra* note 3, at 263. As of March, 1954, only 24 individuals had been dismissed from the British civil service pursuant to this program, while 72 had been transferred to non-sensitive duties. *The London Times*, March 17, 1954. It is also noteworthy that under the British system "an adverse judgment amounts only to a decision that a particular individual is unsuitable for a particular post and does not carry with it, as does a judgment of 'disloyalty' any general moral stigma." Bontecou, *Id.* at 271.

(a). See also the procedure followed by President Wilson in World War I, p. 16, *infra*.

In any event, even if the peril were as great as the Attorney General suggests, there would be no justification whatever for sham hearings. The government in its brief professes to be startled by the suggestion that it would be better to have no hearings than an unfair hearing (Resp. Br. 102-103, fn. 45). The loyalty hearing presents to the community the illusion of a result arrived at by an independent and informed deliberative body which has weighed the evidence and afforded the defendant his day in court. The stigma of a discharge made in such circumstances is obviously of far greater impact because the employee will be understood to have been dismissed, not arbitrarily, but after what is purportedly a quasi-judicial proceeding. A summary dismissal program would put an end to the deception inherent in a proceeding which has the cloak of due process without its substance.

C. Wieman v. Updegraff Precludes Arbitrary Procedure

The core of the government's conceptual argument in this case is the contention that the executive power to establish a loyalty program and to discharge federal employees is "plenary" and "unrestricted" (Resp. Br. 23, 31). The government denies that these powers are subject to constitutional limitations. It insists that the due process clause is "inapplicable to the removal of Government employees" and that the "First Amendment cannot be regarded as placing *any* limitation on the executive power of removal from Government office" (Resp. Br. 41, 79) (emphasis added)

These are sweeping contentions. They are clearly at variance with the ruling of this Court in *Wieman* v. *Updegraff*, 344 U.S. 183, 192:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pur-

suant to a statute is patently arbitrary or discriminatory."[13]

The government maintains, however, that *Wieman* v. *Updegraff* decided only that, under the due process clause, the executive cannot establish arbitrary qualifications for office, but that due process does not limit the procedure to be followed in determining whether the employee meets the qualifications specified (Resp. Br. 56). In other words, the government claims that in this situation due process requires "due substance" but does not require "due procedure." Patently, however, arbitrary procedure leads to arbitrary substantive results. Something more may be required by due process than procedural fairness, but that is what it minimally and most uncompromisingly requires.[14] Indiscriminate classification of the loyal with the disloyal is no less objectionable than the "indiscriminate classification" of the innocent with the knowing which this Court condemned in *Wieman* v. *Updegraff*, 344 U.S. at 191. Procedure which leads to such arbitrary classification is fatally defective. The government's argument is an extraordinary inversion of the historic debate over substantive and procedural due process[15] and is clearly untenable.

The question in this case, therefore, is not whether the executive power in discharging government employees is subject in appropriate cases to the procedural and substantive limitations imposed by due process clause and

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[13] We do not understand the government to challenge this Court's pronouncement in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100,

> "that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . .'"

[14] "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347.

[15] See Walton H. Hamilton, "The Path of Due Process of Law" in *The Constitution Reconsidered* 167 (Conyers Read ed. 1938).

the First Amendment. Those issues have already been settled by this Court adversely to the claims pre[illegible]d by the government. The true issue is whether the executive is acting arbitrarily when it stigmatizes a citizen as disloyal without affording him an opportunity to confront and cross-examine his accusers.

D. History Does Not Support the Executive Action

The historical parallels which the government purports to find are so dissimilar to the present case that they do not constitute even a precedent, much less authority for the present action.[16]

The spoils system, to which the government repeatedly alludes (Resp. Br. 21, 42, 78) did not involve adjudications of status and character; a person dismissed for political reasons was not stigmatized with a "badge of infamy" after a formal hearing before an executive board. President Wilson's confidential executive order during World War I, cited as a precedent by the government (Resp. Br. 71-72) provided that the head of a department could "forthwith remove" an employee where there was ground to believe "retention of such employee would be inimical to the public welfare". The removal could be "made without other formality than that the reasons shall be a matter of confidential record, subject, however, to

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[16] When invoking history, the government repeatedly cites *Galvan* v. *Press*, 347 U.S. 522 (Resp. Br. 20, 29, 41). The government's reliance upon that case in this context is quixotic. For in *Galvan*, this Court decided that the executive could constitutionally deport an alien who, in the words of the government (Resp. Br. 29), was "shown to have been willingly a member of the Communist Party from 1944 to 1946 although *not shown to have been aware* of its advocacy of violent overthrow of the Government." (emphasis added) But in *Wieman* v. *Updegraff*, 344 U.S. 183, a case involving limitations on the power over government employees, it was *precisely* this "indiscriminate classification of innocent with *knowing* activity" which invalidated the statute (344 U.S. at 191). In other words, the Court has held that what the government can do in cases involving aliens, it cannot do in cases involving citizens who are governmental employees.

inspection by the Civil Service Commission." Such a procedure is far removed from a formal finding that "there is a reasonable doubt as to the loyalty of a person" made after an ostensible hearing.[17]

The fact is that issues of loyalty and security received scant attention before World War II. The Civil Service rules prohibited questioning applicants as to their political views or affiliations. 5 C.F.R. § 1.2 (Cum. Supp. 1943). During World War II, the War and Navy Departments and the Coast Guard were authorized to remove an employee "summarily" when such "immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security". 54 Stat. 679, 713, 50 U.S.C. App. § 1156 (1946),[18] see *Bontecou*, op. cit. note 3, *supra*, pp. 12-13. The employee was entitled to be "fully informed of the reasons for such removal". The 1947 executive order establishing a loyalty program, replete with a panoply of boards, hearings, and formal findings is without any precedent in American history.

E. The Authorities Cited by the Government Are Inapposite

The government reasons that since the power to remove is unqualified, the establishment of a loyalty program in connection with discharge is likewise "a matter of executive discretion" (Resp. Br. 31). But power cannot be exercised without regard to the consequences. Power otherwise constitutional may be exercised in an unconstitutional way.

In other situations the courts have held that power confided to the executive by the Constitution is not

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[17] The government relies upon President Wilson's practice at one point (Resp. Br. 71) and then attacks such summary dismissal procedure at a later point in its brief (Resp. Br. p. 102, fn. 45).

[18] This act was superseded by the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22-1 ff. which authorizes certain agencies in their "absolute discretion and when deemed necessary in the interest of national security, [to] suspend, without pay, any civilian officer or employee * * *."

absolute, but must be exercised in accordance with appropriate constitutional limitations. Thus, in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, this Court referred (299 U.S. at 320) to

> "the very *delicate, plenary* and *exclusive* power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress *but which, of course, like every other governmental power, must be exercised in subordination of the applicable provisions of the Constitution.*" (Emphasis added)

Jurisdiction over aliens has been characterized as "inherent in the executive power", *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542, and was described by this Court in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 as "absolute and unqualified". But since *The Japanese Immigrant Cases*, 189 U.S. 86, this Court has held that aliens cannot be deported without due process. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And due process has been held to be denied in deportation cases where the executive relied upon secret testimony or failed to produce for cross-examination witnesses whose testimony had been relied upon. *Unger* v. *Seaman*, 4 F. 2d 80, 81 (8th Cir.), *In re Sugano*, 40 F. 2d 961 (S.D. Cal.); *Maltez* v. *Nagle*, 27 F. 2d 835 (9th Cir.).

The government seeks support in two cases involving the exclusion of alien immigrants, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, and *Shaughnessy* v. *Mezei*, 345 U.S. 1 (Resp. Br. 23, 57). The government reasons that since executive action based upon confidential information was upheld in these cases, by parity of logic it may be sustained here (Resp. Br. 58). We think the government's reliance upon these cases is misplaced. The privileges that are accorded or withheld from alien immigrants who have not even been admitted to the country scarcely furnishes a just or appropriate yardstick for

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IN THE

Supreme Court of the United States

OTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

APPENDIX TO REPLY BRIEF FOR THE PETITIONER

As Appendix to our Reply Brief we reprint the story of the trial and acquittal of Beatrice Murphy Campbell which was published in The Washington Post and Times Herald, April 17, 1955, page E-1, Col. 1. We think it relevant because it is a graphic description of the power which the Department of Justice is asking this Court to approve.

THURMAN ARNOLD,
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measuring the rights of citizens. Compare *Wieman* v. *Updegraff* with *Galvan* v. *Press*, note 16 *supra*.

In *United States* v. *Nugent*, 346 U.S. 1, upon which the government relies, the Department of Justice hearing at which the FBI report was withheld was merely "advisory"; the final decision was vested in the Appeal Board which was free to disregard the Department's recommendation. Moreover, as the Court recently explained in *Simmons* v. *United States*, 23 L. W. 4127, 4129 (March 14, 1955) "We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishing of a fair resume, maintained the basic elements of fair play." In any event, a man is not stigmatized or disgraced if he is denied an exemption from service in the armed forces.

The government argues that a discharge for disloyalty is different only in degree and not in kind from a discharge for theft or bribery and that individuals have been dismissed on these grounds without a fair hearing. (Resp. Br. 21-22, 56). Had Dr. Peters been stigmatized as a thief by an executive board under a similar formal program after a quasi-judicial hearing without an opportunity to confront his accusers his constitutional rights would have been equally violated.

The bribery analogy used by the government is not in point. It is unthinkable that the government would attempt to establish bribery, theft or other specific offenses by the methods employed in this case. There is no claim of a vast nationwide conspiracy headed by men of incalculable ingenuity to subvert government officialdom as a whole into a tendency to take bribes. The reasons advanced by the government for the use of anonymous informants simply do not exist in bribery or theft cases.

Furthermore bribery or theft involves a trial for what a man has done. Disloyalty procedure tries the accused for what he had thought and said and, therefore, *may* do. A bribery or theft case does not involve First Amendment considerations; a loyalty case does.

F. Confrontation Will Not Impair the Government's Secret Information Services

The government argues that confrontation is not required even if the due process clause is held to be applicable to this case (Resp. Br. 59-70). It concedes that a procedure which denies "confrontation and cross-examination may, in some circumstances, be 'patently' arbitrary" (Resp. Br. 60). But it argues that it should not be compelled "to choose between disclosure and retention of employees as to whose loyalty there is a reasonable doubt" (Resp. Br. 24).

It is important to note that Petitioner does not claim that in exercising normal managerial functions the executive cannot collect or rely upon confidential information in appointing and dismissing employees. It can do so in the same manner as any private employer. The question is whether information so gathered can be used, without disclosing the source, in formal proceedings which lead to an adjudication of disloyalty to one's country. The government posits false alternatives. The choice is not between disclosure or retention of disloyal employees. It is (i) between the traditional and customary mode of removal in order to "promote the efficiency of the service" (5 U.S.C. § 652(a)), in which the government is free to use or not to use confidential information, or (ii) full disclosure to the employee in connection with a fair hearing where opportunity is given to explain and refute.[19]

In addition, it is an exceptional case where an undercover agent must be exposed in a loyalty hearing. Actually it is the unlimited right to protect gossip which is involved

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[19] The government acknowledges (Resp. Br. 65) that in a "criminal prosecution, such as treason or espionage * * * the Government must choose between disclosure and non-prosecution." Not only can the government not secure a conviction on the basis of secret testimony, but it must make available to the defendant information in its possession which might *exculpate* the defendant. *United States* v. *Andolschek*, 142 F. 2d 502 (2d Cir.); *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir.); *United States* v. *Grayson*, 166 F. 2d 863 (2d Cir.).

here rather than protection of important paid secret informers. Data gathered by such persons is apparently rarely involved in loyalty proceedings. The Chairman of the Loyalty Review Board of the Second District (the New York area) between 1948-1950, Ernest Angell, recently agreed in testifying before a Senate Committee that there is "no doubt whatever" that "the overwhelming bulk of the total derogatory information which you see in the security and loyalty cases comes from the casual informer, like the corner grocer and the neighbor and the college classmate, rather than from people whom the Federal Bureau of Investigation has planted in a Communist underground." *Hearings Before Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21*, 84th Cong., 1st Sess., p. 1260 (March 17, 1955) (stenographic transcript). He testified that in the course of his duties he had examined "many hundreds" of FBI investigative reports and that the proportion of those in which derogatory information was based upon the direct personal knowledge of an undercover agent was "very, very low and small". *Id.* at pp. 1256-1259.

The government states that it is necessary to preserve the anonymity of casual informants because such persons do not wish to become "involved in a public controversy" (Resp. Br. 62). Pressed to its logical conclusion, the Government's argument would make impossible rational administration of justice. The extremes to which the government has pressed the category of casual "confidential informants" is indicated by a recent case in this Court, *Simmons* v. *United States*, 23 L. W. 4127, 4129 (March 14, 1955). The government characterized as a "confidential informant" an individual who told an FBI agent that an applicant for exemption from the draft was "a rather heavy drinker and crap shooter in and around local taverns and pool halls."

Absent confrontation, the employee is frequently incapable of defending himself. "He is rarely able to form

a clear impression of the nature of the case which the FBI report makes out against him. It is quite conceivable that he may prepare his defense on an erroneous inference. It is possible that he may not be able to formulate any defensive position whatever. His only defense may have to be an affirmative statement of loyalty, buttressed by as many statements of his good character as he can obtain. It is impossible for him to know when he has sustained a burden or proof sufficient to result in a determination of loyalty. The employee's opportunity to defend his reputation may thus be hopeless." Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L.J. 1, 102 (1948).

Confrontation, moreover, is vital not only to the employee "who may otherwise be victimized by the malice or mistake of the informer, or the erroneous recording of the investigator," but it is equally "valuable to the body that must make a decision concerning the facts." Gellhorn, *Security, Loyalty, and Science* 207 (1950). Without an opportunity to ascertain the credibility of the informant, the board is compelled to abdicate judgment to the federal police, pp. 23-24, *infra.* And as this Court has stated, "[j]udgment on issues of public moment based on * * * evidence not subject to probing by judge and opposing counsel, is apt to be treacherous." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 434.

In any event, "[w]hen the Constitution requires a hearing, it requires a fair one . . . " *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50. Confrontation and cross-examination are essential ingredients of a fair hearing. As Mr. Justice Black stated for the Court in *In re Oliver,* 333 U.S. 257, 273:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and *these rights include, as a minimum, a right to examine the witnesses against him,* to offer testimony, and to be represented by counsel." (emphasis added)

G. The Loyalty Board Cannot Exercise Independent Judgment in Evaluating a Secret Report

Stripped to its essentials, the loyalty program delegates to the federal police the power to decide the disloyalty of anyone connected with the government even in the most casual capacity and to impose on such persons stigma and disgrace. This fact emerges clearly from the analysis of the investigative technique in loyalty cases by an independent scholar who is cited in the government's brief. Bontecou, *The Federal Loyalty-Security Program* 85-86 (1953).

Miss Bontecou explains that in cases involving confidential informants "whose identity is disguised by the use of a symbol, the [investigator's] report is *digested and summarized* in the Bureau before it is submitted to the agency which is to evaluate it." (Id. at 85). The FBI "strikes out irrelevant material" and it also "conceals the source of the information and the method by which it has been obtained, whether from an undercover agent, a stool pigeon, a check to determine the source of incoming mail, a telephone tap, or by other means." (Ibid.) The Bureau transmits to the Loyalty Board panel "a *general evaluation of the informant* such as a statement that he is of known reliability, that he has furnished information in the past which has proved reliable, or that his reliability is uncertain." (Id. at 86). Miss Bontecou states that "Mr. Hoover himself admits that this practice amounts to a departure from the general rule and that, when it is followed, *the Bureau has evaluated the material it submits.*" (Id. at 86).

The process by which intelligence data is gathered and transmitted inevitably involves evaluation. The agent who collects the information in the first instance, in drafting a report of an interview, must sift and choose the material he deems pertinent from the mass of data which has been orally given to him. The questions he asks or fails to ask also involve selection. If his superior condenses or summarizes, there is a further process of editing.

There, in front of my fellow employes, I was asked to hand over my building pass. In a gesture of innocence, I handed over two passes. Cold eyes stared at me. Why two passes?

Once, months before, I had misplaced my pass and on pay day had asked for another to use for identification at the bank. I have a penchant for saving things, and when I finally found the first one weeks later, I just kept them both in my wallet. The explanation was so simple!

Yet I began to feel guilty. I was to know that feeling many times in the next four months—that feeling that if here in America one could be put through so much, maybe there was something I had forgotten. It was a feeling of knowing I was right, but of trying to find out the why of what was happening to me.

My fellow employes sat around me, knowing that something was going on. Later, I was to read these ironic words in my letter of suspension: "This and all subsequent communications addressed to you will be marked personal in keeping with the policy . . . to regard all proceedings as personal between the agency and the employe. This policy is intended to protect the employe."

And there I stood before my fellow employes, being humiliated. Was that protection? Was that personal between myself and the agency? How much more public could an accusation have been?

Then the Personnel Director and I went to the elevator and down to the first floor. He took me all the way to the door and watched me go out—as if I could not be trusted to go that far by myself, the same door through which I had been coming and going for eight years! I was told that if I wanted my personal belongings (which I had refused to try to carry with me) I must phone, and one of my fellow employes would bring them down to the door to me.

Surely the charge against me which warranted such humiliating treatment, such safeguards against my presence in a Government building, must be grave. There must be definite evidence of attempts to overthrow the Government,

The Loyalty Review Board panel cannot do anything but accept the "summary" and "evaluation" transmitted by the FBI. It does not know whether relevant material has been deliberately or inadvertently omitted. It has no independent means of knowing whether the secret informant is a sage or a fool, a patriot or a concealed Communist, a reputable citizen or a Harvey Matusow. And yet as a report by a Joint Congressional Committee on Atomic Energy pointed out:

> "An informant may perhaps give the FBI highly unfavorable advice but when placed under oath before a local board, deny all that he had said, admit that he knows little or nothing about the employee, and admit further that he bore him a grudge." Sen. Rep. No. 1169, 81st Cong., 1st Sess. pp. 59, 68 (1949).

In sum, the conclusion is inescapable that the Loyalty Review Board can not "weigh" and "appraise" the evidentiary value of a secret FBI Report in any judicial sense. Where secret reports are the basis of its finding the essential factors which should control the decision rest in the judgment of the Department which makes up the secret dossier. The power to impose stigma and disgrace is thus delegated to the Federal Bureau of Investigation. Due process is denied when those who are authorized to decide are denied access to information which is essential to the decision.

CONCLUSION

We believe that the only issue in this case is whether the government can stigmatize a citizen as disloyal to his country after a formal hearing without due process of law. The government argues that this is a dismissal case, and it professes to see no difference between this case and a dismissal on any other ground or by any other procedure. We think that the government itself has recognized the difference by the elaborate regulations and proceedings for loyalty and security cases which it has not seen fit to set up for other types of discharge.

The difference becomes crystal clear when a loyalty discharge is compared in its important and significant particulars with other informal types of dismissal.

1. The loyalty program was publicly proclaimed in E. O. 9835 as a method of "maximum protection" of the government from its enemies and at the same time a procedure which gave "equal protection" to the employee from "unfounded accusations". No such pretense is advanced in informal procedure.

2. The loyalty program purports to judge employees on "all the evidence". The informal proceedings make no such promise.

3. The loyalty and security programs set up boards which are independent of the personnel officers who hire and fire. These boards are given great dignity. The Attorney General takes pride in pointing out that the members are in *Who's Who* (Resp. Br. 103, fn. 46). The accused is promised that the independent judgment of these boards will determine his case. But in every case where a secret F. B. I. report is the basis of the board's decision the accused is deprived of the independent judgment of the board. The secret report on which the board decides is summarized and edited, by the F.B.I. which also evaluates the reliability of the informant. Thus independent judgment of such a report by the board is impossible.

The informal procedure holds out no promise for independent judgment by persons outside of personnel management. No particular dignity or sanctity is given to these judgments by personnel officers.

4. Loyalty and security hearings take as their subject matter the entire life of the accused. They make it possible for the board to exercise hindsight judgment during four periods of history. The first of these periods is the early part of the Russian Revolution which some men hated for its cruelty and its radical philosophy while others thought it was a historical event which might free Russia from the tyranny of the czars. The second of these periods followed the recognition of Russia by the

United States. During that time distinguished men like Ambassador Davies wrote his *Mission To Moscow* which might now easily be taken as evidence of Communist tendencies in spite of the fact that it was an entirely honest appraisal. The third period followed the German-Russian pact in 1939. The fourth period covered the years during which Russia became our ally in the war, our associate in the Nuremberg trials, and our colleague in founding the United Nations. The last is the period of the cold war during which hatred and suspicion of Russia has become so intense that some men think they are entitled to view any opinion of the accused favoring Russia in any of the former periods as cumulative evidence of disloyalty. The persons who initially edit, summarize and determine the relevance of associations and opinions in all these historical periods are agents of the F.B.I. Valuable as the F.B.I. is as a police agency, they are not qualified to be and cannot be objective historians. Indeed, no group of men is less adapted for this sort of task than the police.

By contrast the atmosphere that surrounds ordinary discharge does not compel an exhaustive inquiry and appraisal into a man's statements and associations covering his entire lifetime, or an appraisal in the light of complex historical events.

5. The loyalty board hearings, as we have shown, in actual effect endow the Department of Justice with power over every other agency of government to whom it is authorized to furnish its secret reports. No one, not even an Ex-President of the United States, can have formed an opinion contrary to these secret reports without risk of a future attack upon his own character as a security or loyalty risk. Under this system a prejudiced Attorney General could impose his prejudices on the personnel of every government department. Mistakes in these reports can never be corrected because they can never be discovered. Nor can malice and bias ever be exposed. No man can be an investigator, accuser and evaluator of his own accusations. Even the most upright cannot escape their own prej-

or of passing secret documents, or of leaking secret information. But they were comparatively slight: "That in 1940-1941, I was 'reportedly' a member of the Washington Bookshop Association; that I attended functions of the Washington Bookshop Association; and that I tried to induce others to join" . . . an association now on the Attorney General's list of subversive organizations.

When I walked out of the building, I walked into a nightmare. I had no savings. I had spent the last 14 years in a cast or brace for the spinal condition. My medical bills had been enormous. Two weeks previously, my son had given up a good job on the West Coast and come home because he felt that my health made his presence imperative. He was still unemployed.

Now there would be the further burden of legal fees. There was no question in my mind about fighting the charges. One always fights for the truth. I had been brought up on the words, "I promised my Lord that I would not; that I wouldn't run away when the battle got hot."

Here is a good time to say that no matter what the state of the pocketbook, a lawyer is absolutely necessary to fight a security case. In A. J. Spere, I had one of the best. That was of great comfort to me.

Several years before, a VA personnel man had told me: "The fact that you write (book reviews) for the New York Times (I had worked up to that, and was proud of it) and talk on the radio (which, my supervisor at the time pointed out, the President of the United States did also) will be used against you." His argument was that "old fogies" believed that decent people didn't talk on the radio and write for the newspaper! Was that why the charges originated?

About a month before, I had been questioned by an agency official about my "reported" membership in the Bookshop Association. Over the years I had been asked the same question in more than a hundred (literally) different ways. My answer was always the same:

udices in the vague area of loyalty and security covering as it does the lifetime of an individual.

The informal procedure may of course lead to mistaken discharges. But this is only an incident to the business of making a living. It is a risk which men must assume in a free society. It is not endowed with solemn sanction of judicial procedure. It does not have the pretense or trappings of a trial and hence does not cloak unjust official action with the apparent impartiality of our trial procedure.

6. Since the formal procedure appears to be a fair trial of men for an offense that is akin to treason those who attack it are linked with the enemies of this country. This is evident from the following testimony of Assistant Attorney General Tompkins on March 8, 1955 before the Senate Sub-Committee on Reorganizations of the Senate Committee on Government Operations:

> "It is becoming increasingly clear that the current attack against Government Witnesses and informants of the Federal Bureau of Investigation *has its roots in a Communist effort to stem the successful compaign of this Government to eliminate the subversive threat of Communism to our internal security.* It has as its objective the hamstringing of the FBI's informant system and there is no more effective way of attempting to do this than through the demand for confrontation of witnesses in these non-criminal matters."

Thus those who argue for confrontation are linked with traitors. No high government official has denounced those who criticize Civil Service regulations as aiding the Communists in their efforts to infiltrate the government.

7. The terrific impact of our formal loyalty and security procedure has been felt over the entire world. In a short period of time it has provided us with more *causes celebre* than our entire system of judicial trials over a quarter of a century. There is the Oppenheimer case, the John Peyton Davies case, the extraordinary Wolfe Ladejinsky case, the spectacle of Dr. Condon being tried and acquitted again

and again till he was driven from government and then even from his job in private industry. There are the cases of John Stewart Service, Dorothy Bailey, and finally that of Dr. John Punnett Peters. It is only out of proceedings that have the appearance of judicial process that such public attention can arise.

In contrast all these persons could have been released by an informal procedure with only passing comment. Consultation with Dr. Oppenheimer could have been broken off quietly and without fanfare. Dr. Peters' term could have been left to expire without a formal finding of disgrace. To classify a procedure such as this as a mere incident to the power of dismissal is simply to deceive ourselves. We can be sure that we will deceive no one else.

8. One final element in this procedure is, we think, conclusive evidence that the executive is here seeking to exercise judicial or quasi-judicial power. In this case no conceivable managerial reason existed for branding Dr. Peters disloyal to his country. Not even the interest of government economy can be urged. No worse test case could possibly be selected.

Why then does the government not reverse the board in this particular case since Dr. Peters' term has already expired, and await some better set of facts to present to this Court? Why does a high Justice Department official give an interview to the press in which he states:

> "The Justice Department wants as much to win public opinion for the Government's loyalty-security program as it does to get a clear-cut Supreme Court decision this year upholding dismissal of Dr. John P. Peters under that program."[20]

The reason is that the Attorney General, as others have done in the past, wants the sanction of judicial process to dignify the executive action in this case. This is a familiar political phenomenon in history. The Russians

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[20] *The Washington Star*, March 28, 1955, p. 4, Col. 3.

attempted to satisfy the same desire in their early purge trials of 1937. There was no lack of executive power in the Russian Government to dispose of those defendants without the finality of a trial. But instinctively the Russian executives wanted to dress their acts in seemly judicial clothing. By doing so they were enabled to appear righteous and thus to allay public doubts and misgivings. It also enabled them to deflect public criticism. No one can criticize a state which disposes of its enemies by fair means. Even an unjust decision is protected if the process is fair. It is the same instinctive desire which is back of the defense in the Peters decision.

No doubt the government would have preferred a better test case than that of an eminent senior professor at Yale University with only a casual connection with the government who was vouched for by distinguished men he had known all his life. But the judicial robes in which the government had clothed the Loyalty Review Board forbade its reversal by executive action. Had the government reversed the board by executive action the illusion of independent judicial judgment would have been destroyed. And so the Attorney General has no alternative except to defend the egregious error of this Loyalty Review Board.

If this Court declares the procedure unconstitutional it will have done an inestimable favor to the Department of Justice. This is because history tells us that attempts to obtain judicial sanctity for arbitrary executive acts without the substance of a fair trial blow up in the faces of those who initiate them. This was true in the case of Joan of Arc. This was true in the case of the Russian purge trials. That the nature of the process here is judicial is conclusively demonstrated by the fact that the government, though it has the legal power to do so, cannot remove the stigma from Dr. Peters without seeming to impair the authority of its alleged independent tribunals. This salient fact should remove all doubt that the proceeding here is judicial in character and must be conducted with due process.

Other cases involving government employees may come before this Court which may be in a twilight zone between the managerial and judicial function. But this case does not require this Court to fix with precision the line beyond which the Government cannot go in discharging employees without a fair hearing. If all the considerations which we have discussed above do not push it into the area where due process is required then there is no such line. This government cannot set up a procedure which is essentially judicial with one hand and rob it of due process with the other without violating the Constitution of the United States.

Respectfully submitted,

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April 13, 1955.

YOU "SHUT OFF FEELING" OR YOU'RE LOST

By Beatrice Murphy Campbell

The telegram reading, "Your return to duty is authorized," ended four of the most harrowing months of my life. Even then I was lucky. For some people, the ordeal has lasted six months and more. Some have gone through it more than once. Four months was enough for me.

My friends, my family asked, "Aren't you happy?" I didn't know. I still don't. I was too numb to have any feeling. Somewhere in the interim, in order to save my sanity, I reached the point where one must shut off feeling or be lost.

I was not an important Government executive. I was an obscure clerk in a public service agency, the Veterans Administration. There are thousands like me in the Government. No state secrets passed over my desk. The material handled by me and others in my department was mailed daily to the public. Yet "in the best interests of the Government" I had been suspended from my job four months before as a security risk, and forced to grope back through 15 years of my life to prove my innocence.

It all began in November. November 22, 1954, was like any other work day for me except that the spinal arthritis which forces me to wear a plaster cast had been kicking up because of the threatening weather. But November 22 was already a special day in my life.

On that same day 12 years before, I had defied the doctors who told me that I would never work again and had accepted a job in the Government. They shook their heads and gave me three months. I had made it for 12 years.

The price had been high. Plenty of rest had been necessary. Outside activities were cut to the bone, so that even a movie was quite a thrill. Visits with friends became the exception.

Never a joiner, my memberships in organizations dwindled down to one church group which understood that I could not take an active part and another religious organization where attendance was not a requirement. No political affiliations—even of the approved kind. No consorting with left wingers, or right wingers, or any kind of wingers. But I had made it for 12 years.

I was proud of that, and grateful. Every year on this date I performed a private ritual. I offered a special prayer of thanks to God and I called my personal physician—who has attended me for the past 10 years—on the telephone and said, "We've made it for another year." For I realized that only by working as a team had we succeeded.

On November 22, 1954, I never made the call.

It was 15 minutes to closing time at the office, and I had just left the rest room after powdering my face preparatory to going home. Someone said I was wanted in the Division Chief's office. I walked in smiling. He is one of the nicest men I've ever met, and there was no need to fear a call to see him.

There was a stranger with him, the Director of Personnel. He handed me a piece of paper. "Will you sign to acknowledge receipt of this letter?" I looked into his unsmiling face and signed.

He handed me the letter, looked at his watch and announced, "As of this minute, you are suspended from your job. I will escort you back to your desk to pick up your personal belongings. You will turn over your building and other passes, and I will see you out the door of the building."

I was stunned. This was no time to think of the contents of the letter. This was the time to gather strength to keep my head high. A moment of panic seized me, however. "Does every one have to know?"

My division chief, who had not been apprised of the contents of the letter, asked to read it. Then he rose to my defense and asked to accompany me. So all three of us walked back to my desk and I picked up my handbag.

Fifteen years ago I attended two autograph lectures given by two of America's outstanding authors at the Bookshop in question. They were Langston Hughes, the poet, and Erskine Caldwell, the novelist, who brought his publisher with him. I was book reviewer for a group of Negro newspapers, and a budding writer and poet myself. I had a definite interest in authors.

There were so very few places in the Nation's Capital 15 years ago where a Negro could go to hear such personalities. I was thrilled at the opportunity. These were open, public meetings. I went; listened to the speakers; was introduced to them afterward and met the publisher, and I went home refreshed. That was all.

When I was questioned a month before my suspension, it was mentioned that a "friend" gave the information about my supposed membership. Not once in the four months of my suspension was my lawyer or I given the name of that friend.

In the first week of my suspension, my lawyer wrote to the agency asking for particulars. What was the (supposed) definite date of my membership? Who made the charge? And so on. Three days before the expiration of the thirty allowed me for replying to the letter of suspension, he received a letter stating that no information could be given.

Had my lawyer and I been able to pinpoint the date in those two years (1940-1941), we would have been saved much work, worry and expense. But when he pressed for a definite date he was told to "just cover from 1940 on." Try reconstructing 14 years of your life!

We had to collect records without knowing exactly what records we needed. We reasoned that we might find the "friend" through a process of elimination. We would just send affidavits to everyone I had ever known, and the one who failed to respond would be the informer.

It was a tall order, but I tried. I sent out more than 200

affidavits; then I stopped because I ran into the phenomenon of The Great Fear.

Friends I had known for years were afraid to put their names on a piece of paper telling the truth. They did not deny that it was the truth. They freely admitted to me privately that I had never tried to induce them to join, or had even discussed, the Bookshop. But, "I don't want to sign anything. You get in trouble if you sign things. It may be used against you later. Look at so and so!" Or, "I hold a job in the Government. If I sign this, I will be investigated later."

Some returned blank affidavits, afraid even to write their names and addresses in the corner.

This is a real, honest-to-God fear of one American to say a good word for another, a friend.

At first I was angry. I wanted to cut out of my life all these false friends. Then I began to see that the fear was so deep and widespread that it couldn't be dismissed that way. Before it was over, I began to realize that there was a basis for their fear.

I discovered that my suspension had been based not on something I had done, but on a misinterpretation of something I had said on behalf of another. So I stopped being hurt and angry. I stopped feeling at all. I just told myself that when it was all over I would have to sit down and take another look at human values. And over and over I kept repeating to myself the words of my own poem, "Lord, keep me away from bitterness."

But I did get replies and affidavits. I found there were people brave enough to speak for me. We collected more than a hundred from people in all walks of life and from all over the country. I found, also, that there were people, poor like myself, who were willing to dig into their pockets and share what they had, not only to see that I did not go hungry but also to see that I had the money to keep up the fight.

I had to wait three weeks for my last salary check (from

which, incidentally, the last 15 minutes of that suspension day had been subtracted). The check was not mailed to me; I had to go down to the building and stand outside the door while it was brought down to me!

I had to worry about whether the child for whom I had made great sacrifices so that he might have a college education would be permitted to use that training in the services of his Government.

I couldn't look for another job because I already had one. I had been suspended, not dismissed.

I—the perennial saver of papers—spent hours and hours (many of them at night when I couldn't put my head on my pillow) poring over papers and scrapbooks and letters and clippings in search of—what? I didn't know.

I had to go back over 25 years of free lance writing and collect copies of everything I had even written (evidence which was never used; but how could we know?).

My mind kept slipping back to my first day in the Government. America was at war. I couldn't go if I wanted to because of my illness. But one of the things which kept me going through those months when the doctor said I couldn't make it was the feeling that by sticking to this routine job I was doing my bit for my country. I was helping to keep servicemen supplied with the things they needed.

My lawyer asked for a formal hearing. Not until the morning of the hearing were we allowed to see the one piece of admitted evidence against which we had to prepare a defense. But it was evidence which we were able to refute completely by facts so substantial that they could not be disputed.

The evidence? Five years before, I had spent two hours talking with an FBI representative about a friend of mine who was seeking Government employment. She was an admitted member of the Bookshop Association who had resigned in protest when the first pink tinge showed. My son was present at this interview.

At the end of it the FBI man sat down and wrote on a

piece of paper—in his own handwriting and in his own words—a summary of what we had discussed, and asked me to sign it in confirmation. Since the interview had not concerned me at all, there was no need for me to feel apprehension about what he had written. So I signed the paper without reading it.

Not until the paper was presented as evidence did I know that what it said was the FBI man's interpretation of our interview. It read: "I joined the Bookshop with . . . in 1940 in order to take advantage of the discounts."

Without my opening my mouth, every word of the statement was proven false. The friend in question was a witness at the hearing. She said she did not join in 1940, but a year or two earlier, then resigned. When she rejoined in 1941, I was ill in bed, fighting for my life. I never even attended a public meeting with her.

I was able to present medical records to prove that during 1941 I spent 10 weeks in the hospital and four months (including the period when she joined) under the care of a private physician, confined to my home.

Perhaps you think that there was no way for my agency to have all of these medical facts. Under ordinary circumstances, no. But in this case, an emphatic yes.

Three times in eight years—beginning five months before I was hired—my agency demanded complete physical examinations to establish my employability. Three times it obtained medical records from former and present physicians and the hospital. It knew every date.

The charge that I became a member to take advantage of discounts was easy to disprove. It was possible for me to obtain direct from the publishers far greater discounts than those offered by the Bookshop. Any book reviewer receives many more books than he can possibly read, so there was no need to seek ways to obtain more. As a matter of fact, I gave a whole library of children's books to a Catholic settlement house.

My boss and spiritual adviser during the period mentioned in my letter of suspension was a Catholic priest and university professor. He was present at the hearing to say how shocked he was at the charge because of my decidedly negative political attitude. Too, I had just become a Catholic in 1940. How could one embrace catholicism and communism at the same time?

A year or two before my suspension, in the voluminous mail which comes to anyone engaged in book promotion there came two papers. I almost overlooked them because of my practice of putting aside "slush" mail to open when I have time. But the stamps caught my eye (my son collects them) and saw that they came from behind the Iron Curtain.

I took them to work and showed them to my supervisor. We agreed that they should be sent to the FBI. My lawyer was able to turn over to the hearing board two letters from the FBI, signed by J. Edgar Hoover himself, thanking me for turning over the material.

Now I have returned to work. The door I was ushered out of has swung to let me in unattended. I sit at the same desk; do the same work; meet the same people; and life on the surface goes on as before. Only I am different.

Only I see the shadow hanging between me and my fellow workers, most of whom refused—or were afraid—to give even the simple verification that I had never tried to induce them to join the Bookshop.

Only I know that here and there behind a hand someone is saying, "She was suspended for subversive activities," without adding, "They didn't find a thing."

I, alone, must bear the tremendous financial burden, and start once more from scratch.

The words on my personal action sheet restoring me to duty after a "suspension unjustified and unwarranted" come too late to erase the corroding effect of the experience upon my spirit.

In the long stretches of the night, I used to rehearse what I was going to say, after I was cleared, to those who had

ailed me in my hour of need. Then one day it came to me hat while on one hand I was praying to God for help, on he other I was trying to take His business into my own ands. Vengeance is not mine.

It is almost too much to expect that I would not be bitter nd resentful. Yet I know I must keep trying. I must keep raying over and over and over, "Lord, keep me away from itterness."

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 376

JOHN P. PETERS, Petitioner

v.

OVETA CULP HOBBY, ET AL., Respondents.

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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April 21, 1955.

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

I.

At the conclusion of the oral argument, the Chief Justice requested counsel to "brief for us the question of whether the [Loyalty Review] Board can review an agency's dismissal of the proceeding against an accused employee." This Brief by Petitioner is addressed to that issue.

We have concluded that this question must be answered in the affirmative. But before addressing ourselves to the reasons for that conclusion, we wish to point out that even if a technical defect in the Board's jurisdiction were to be discovered at this late date, we believe that it is appropriate for the Court to decide the basic constitutional issue of whether the punishment imposed on Dr. Peters is one which must be accompanied by due process.

In oral argument counsel for Petitioner stated that he would prefer not to win the case on the ground that the Loyalty Review Board had no jurisdiction to try and condemn Dr. Peters. Counsel was properly admonished by one of the Justices that his preference for grounds of the decision was not a relevant consideration. What counsel should have said, and what he now says, is that if the case is decided on this technical procedural ground, Dr. Peters will have lost.

It is of no comfort to petitioner that such a decision would leave him free to apply for another government appointment. The Court must realize that having been stigmatized as disloyal he has no chance of such an appointment. Indeed, he has small chance of traveling abroad because the grounds for his conviction of disloyalty are the same grounds which would deny him a passport. He and others like him will not be accepted for employment in defense industries. For the rest of his life he must wear the badge of infamy which the Board has imposed upon him.

Even if the Board were lacking in jurisdiction, the constitutional issues in this case should be decided. Otherwise Dr. Peters will never have had his day in court. He has no action for libel. He has no remedy whatever. His own government has accused him, tried him and condemned him as disloyal to his country. If this Court holds that this procedure does not violate the Constitution, Dr. Peters must face the consequences with resignation. But at least he will have had his day in court. Surely this Court would not seek to deny him that.

The rule so often announced by this Court that constitutional issues will not be decided where there are other grounds for decision is a rule of practice based upon the discretion of this Court. It is supported by many sound reasons. There is the respect which the Court should give to an act of Congress which should be presumed valid unless the Court is compelled to conclude otherwise. There is the danger that the decision may be premature if the issue of constitutionality lies in the periphery rather than in the center of the case. There is the possibility that a case may be manufactured for the purpose of obtaining a constitutional ruling.

But this case is not affected by any of these considerations. No act of Congress is involved. Certainly a decision on this issue nine years after the loyalty program was initiated and four years after this Court divided four to four in Bailey v. Richardson, 341 U.S. 918, cannot be premature. Nor can it be suggested that Dr. Peters invited this trial and obtained this badge of infamy in order to bring a test case.

We are asking this Court to remove this badge of infamy by holding that the Board could not and did not exercise an independent judgment based on evidence which it could evaluate. We are asking it to hold that Dr. Peters had no opportunity to defend himself because he could not know or cross-examine his accusers. If that issue is not decided, Dr. Peters will remain branded before his profession as a person convicted by his peers, as one to be shunned and avoided because he has been disloyal to his country. It

will do him no good to have this Court say that he was convicted by the wrong tribunal, if it does not remove the stain of the conviction.

Failure to decide the real issue in this case puts the Government of the United States under a cloud. If the Government is sincere, and we are sure it is, it must carry on the loyalty and security program until the cold war is over. We urge this Court consider the injustice in the event that the Court at some later day holds that these hearings lack due process to those who are convicted in the interim. Their salaries will have been forfeited; their careers ruined. It will be small comfort to them or to their surviving children to learn years later that it was all a ghastly mistake.

We say that the Bill of Rights was meant to be a living part of our Constitution, capable of affording effective relief to those injured by its violation. A decision of this Court which does not face the issue of constitutionality would put the Fifth Amendment so far back on the shelf that most of the injured persons can never reach it. The story of Beatrice Murphy Campbell which we have filed as an Appendix to our Brief shows that the penalty of suspension from employment and preparation for one of these character trials is worse than conviction for the ordinary offense. There are 150 boards now sitting on these cases. If their procedures are lawful and necessary, they should be approved. But if they are unlawful, countless victims should not be forced to undergo unnecessary disaster. And the millions of Government employees whose freedom of speech and association are threatened and whose morale is impaired by the

hazard of conviction by a process which we charge is in violation of the Constitution are entitled to have this issue settled.

In the second restrictive covenant case, this Court held that it was proper to decide a constitutional issue even though the parties before the Court were not within the class whose constitutional rights were infringed. Barrows v. Jackson, 346 U.S. 249. The Court recognized (346 U.S. at 257) that it was "faced with a unique situation *** which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." The Court accordingly concluded (Ibid) that "under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."

If judicial sanction by default is given in this case, these injustices must go on. To decline to consider the issue of constitutionality in this case is to change the salutory discretion of the Court to decline to decide constitutional issues into a hard and fast rule that constitutional issues should be avoided, because it is a good thing, in the abstract, to avoid them.

But even if the hard and fast rule were adopted, we still do not believe that this Court could escape a decision on the issue whether or not the conviction of Dr. Peters is a punishment in the eyes of the law. This is shown by a colloquy between the Chief Justice and the Assistant Attorney General which reads as follows (Tr. 62):

"Mr. Burger: I can hardly think of any agency where they accomplished dismissal on one of these derogatory grounds and reemployed the man within three years, or any of the other agencies of the Government employing him, depending, of course, on what the derogatory grounds amounted to.

"The Chief Justice: We have had instances recently where one department released a man because he was a security risk and another department of the Government hired him the next day.

"Mr. Burger: Not under this kind of proceeding at all, Your Honor.

"The Chief Justice: What kind of proceeding? You said that you cannot conceive of their ever re-employing him.

"Mr. Burger: Because there has been no determination in the case that you are referring to. There was a dismissal within an arbitrary authority to dismiss. There was no hearing; no process had been gone through at all."

The quoted colloquy establishes clearly that in the present case a punishment is applied. Where, however, a person is dismissed even on security grounds under arbitrary authority and without a supposed hearing, other Government officials are free to disagree with the conclusion, to hire the person, and to rehabilitate his reputation, as in the Wolf Ladejinsky case. But, as the Assistant Attorney General pointed out, no Government official dares to contradict or disagree with the finding of a Board after "hearing", after "process". Accordingly, the badge of infamy placed by these hearings is a permanent stain, and it makes no difference whether or not it is formally accompanied by a recital of disbarment from Government employment for years or for life. This is the vice of the findings without a true hearing. This is a vice which will not be erased on merely technical grounds.

It is thus made clear that this determination of guilt by the Board is in a different category from ordinary

dismissal even on security grounds. The Government has given Dr. Peters an unfavorable status as a result of his trial and conviction which it asserts it intends to maintain. If the imposition of this status be a punishment, this Court cannot say that its continuation can be permitted simply because, by an alleged misconstruction of its own order, it was imposed by the wrong tribunal. If Dr. Peters were in jail, a reversal on technical grounds would let him out. That is not true in this case. A reversal on technical grounds here results in the continuation of the punishment. The Court is, therefore, faced squarely with the constitutional issue of whether this is in fact the kind of punishment which may be inflicted without due process of law.

II

A) Stated precisely, the question which the Court has asked counsel to brief is whether Regulation 14 of the Loyalty Review Board, as amended, was authorized by E. O. 9835, as amended, and as superseded by E. O. 10450. An answer to this question requires a brief summary of the text and sequence of the applicable orders and regulations. These are set out below.

Executive Order 9835 (12 F.R. 1935) which established the Loyalty Program in March 1947, authorized the Loyalty Review Board (Part III, Section 1, Subsection a)

> "to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned."

The Board was empowered to

> "make rules and regulations, not inconsistent with the provisions of this Order, deemed necessary to implement statutes and executive orders relating to employee loyalty."

Standing alone, these provisions would not necessarily have authorized the Board to review an agency determination which did not involve a recommendation for dismissal.

But Executive Order 9835 further provided (Part III, Section 1, Subsection c, Para. 1) that the Loyalty Review Board should "advise all departments and agencies on all problems relating to employee loyalty". The Board was further directed to "coordinate the employee loyalty policies and procedures of the several departments and agencies."

From the outset the Loyalty Review Board asserted jurisdiction to post-audit agency decisions favorable to the employee. It concluded, in short, that the power to "advise" and to "coordinate" comprehended the authority to review "any" departmental decision involving loyalty. Paragraph 14 of the original "Regulations for the Operations of the Loyalty Review Board", approved and adopted by the Board on December 17, 1947, provided as follows:

> "The Board shall, as it deems necessary from time to time, post-audit the files on loyalty cases decided by the employing Department or Agency or by the Regional Loyalty Board.
>
> "The Board shall have the right, in its discretion, to review on its own motion any determination or decision made by any Department or Agency Loyalty Board or Regional Loyalty Board or any head of employing Department or Agency, even though no appeal has been taken."

On October 4, 1948, Regulation 14 was revised by the Board (Civil Service Comm. Mem. No. 21) as follows (5 C.F.R., Sec. 210.14 [1949]):

> "Post-audit and review of files.
> (a) The Board, or an executive committee of the Board shall, as deemed necessary from time to time, cause post-audits to be made of the files on loyalty cases decided by the employing department or agency, or by a regional loyalty board.
>
> "(b) The Board, or an executive committee of the Board, shall have the right, in its discretion, to call up for review any determination or decision made by any department or agency loyalty board or regional loyalty board, or by any head of an employing department or agency, even though no appeal has been taken. Any such review shall be made by a panel of the Board, and the panel, whether or not a hearing has been held in the case, may affirm the determination or decision, or remand the case to the head of the agency concerned for hearing, with appropriate instructions or for such further action or procedure as the panel may determine. In exceptional cases, if in the judgment of the Board or of an executive committee of the Board, public interest requires it, the panel may hold a new hearing in the case and after such hearing, affirm or reverse the determination or decision."
> (emphasis supplied)

During oral argument, it was suggested that the phrase "even though no appeal is taken" in the foregoing regulation would be pointless if review of all decisions, including those favorable to employees, were intended (Tr. 34). But Regulation 14, as amended, was a regulation promulgated by the Loyalty Board itself. And since it was construed by the very Board which issued it to authorize post-audit reviews of department decisions favorable to the employee, a contrary construction is precluded. The phrase "even though no appeal is taken" should thus be read as emphasising rather than as limiting the plenary scope of the Board's jurisdiction.

A 1949 directive reflected the Loyalty Review Board's view that it was empowered to review an agency decision favorable to the employee. The various departmental loyalty boards were instructed (Civil Service Com. Mem. No. 35, Feb. 1, 1949) to warn employees cleared by the department that

> "The decision of this [departmental] board is subject to post-audit by the Loyalty Review Board on the record transmitted, with respect to matters of procedure and also to the right of the Loyalty Review Board to institute a review of the case on the merits." 1/

The post-audit was thus utilized by the Loyalty Review Board to coordirate and to preserve uniformity in loyalty matters among the various federal agencies. It was by this instrument that the Board superintended departmental boards whom it deemed unduly lax in loyalty matters. Bontecou, The Federal Loyalty-Security Program 56 (1953). As Miss Bontecou explains (Id. at p. 55):

> "The postaudit was in the beginning simply a device for obtaining an over-all view of the operations of the lower boards and checking on their procedures. It has developed into one of the most important means for imposing substantive as well as procedural standards."

On April 28, 1951, E. O. 9835 was amended by President Truman. E. O. 10241. The standard for refusal of employment or removal in Part V of E. O. 9835 was amended. But Part III of E. O. 9835, which defined the jurisdiction of the Loyalty Review Board, and which the Board had construed as authorizing post-audit reviews, was not altered by the President.

1/ "If the judgment of the lower board is favorable after the hearing, the employee may be so informed, with a warning that this decision is not final until the case has been post-audited and approved by the Review Board." Bontecou, The Federal Loyalty Security Program 58 (1953).

The Loyalty Review Board notified Dr. Peters on April 6, 1953, that it intended to conduct a post-audit (R. 6), and Petitioner was advised on May 22, 1953, that the Board had concluded that there was a reasonable doubt as to his loyalty to the Government of the United States (R. 8). On May 27, 1953, Executive Order 9835, as amended, was revoked and superseded by President Eisenhower. Executive Order No. 10450, 18 F.R. 2489, 5 U.S.C.A. § 631, note. The Loyalty Review Board was thereby abolished. Section 11 of E. O. 10450 expressly recognized that the Loyalty Review Board had asserted jurisdiction to post-audit decisions favorable to the employees concerned. It provided that

> "Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date [i.e., the effective date of E.O. 10450, May 27, 1953] shall be acted upon by such Board ***."

Section 11 on its face distinguished "agency determinations favorable to the employee" from "appeals pending before the Loyalty Review Board." It thus explicitly recognized that the Board was exercising jurisdiction over both cases where the Department had recommended dismissal and cases where it had not done so.

Section 12 of E. O. 10450 provided that the Loyalty Review Board should continue to "exist and function for a period of one hundred and twenty days from the effective date of this Order" to act upon the cases pending under Section 11. In other words, the President expressly recognized that the Loyalty Review Board was exercising jurisdiction over "agency determinations favorable to the officer or employee concerned" and he directed the Board to continue to process such cases.

B) In determining the validity of an administrative regulation, its origin, operation and acceptance by the President are factors of controlling importance. While we acknowledge that under part of the language of Executive Order 9835 the authority for Regulation 14 is not free from doubt, we are convinced that these other factors, outlined above, establish its validity.

First. Regulation 14 was adopted contemporaneously with Executive Order 9835 and was thereafter followed continuously and consistently for a substantial period of time. This Court has held that administrative interpretations are entitled to great weight

> ". . . where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress." United States v. American Trucking Ass'ns., 310 U.S. 534, 549.

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315, contains a similar statement:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute. . ."

See also United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84.

This Court has held that judicial alteration of a settled administrative interpretation is particularly undesirable where citizens have "acted in reliance" on the administrative construction of a statute. United States v. Chicago, N.S. &

M.R. Co., 288 U.S. 1, 14. This consideration is most appropriate here, where both the Government and its employees have relied over a long period of time, in matters of the most vital importance, on the validity of Regulation 14.

The reasons why courts should not overturn administrative interpretations such as Regulation 14 have been cogently stated by Dean Erwin N. Griswold in an article dealing with tax regulations:

> "The importance of the contemporaneousness of the regulation as an element in making a workable administrative scheme is readily apparent . . . . In the first place, unless the language of the statute is very general, the primary problem is to ascertain the meaning of the statute as of the time it was enacted. Regulations issued substantially contemporaneously with a statute are the expression of what the statute was understood to mean by those immediately charged with carrying it into effect. Moreover, contemporaneous regulations often express the general understanding of the times, and the actual understanding of men who played an important part in the drafting of the statute . . . .
>
> "Another reason why contemporaneousness is an important factor is its bearing on the need for certainty and predictability in our tax laws. This is where the notion of the Court's function in the scheme of judicial tax administration becomes important. A statute is enacted. A regulation is issued. It will, in the normal course of events, be five or six years, and very likely more, before the construction of the statute, in the light of the regulation, will come before the Supreme Court. In the meantime, people will go on living, and transactions will be conducted under the statute, perhaps all the transactions that are ever going to be conducted under the statute. Thus, it seems that a strong argument can be made in favor of giving very heavy weight to a contemporaneous regulation, so that taxpayers may rely upon it and have some certainty that it will be followed by the courts . . . .
>
> "The Supreme Court's construction of the statute many years after the event, may be abstractly a better or sounder construction than the administrative construction of the Treasury; but it makes bad law if it upsets the reasonable expectations of taxpayers and, it may fairly be said, of the Treasury. The Supreme Court sometimes seems unaware of the serious effect of the time lag in its decisions. The very fact that the Court decision comes years after the event is a strong argument for upholding the contemporaneous administrative construction of the statute, when, as

> will usually be the case, it is within the bounds of reason." Griswold, A Summary of the Regulations Problem, 54 Harvard L. Rev. 398, 405-407 (1941)

We believe that Dean Griswold's reasoning applies with special force to the case at bar. This Court should not hold void a perfectly reasonable practice followed and relied on for years merely to attain what might be thought "abstractly a better or sounder construction" of an order no longer in existence.

Second. Even if the factors discussed above were not entitled to weight, Regulation 14 must be upheld because it is apparent that the President was fully cognizant of it and ratified it. As this Court said with reference to the validity of an immigration regulation under a section of a statute:

> "The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor." Costanzo v. Tillinghast, 287 U.S. 341, 345.

To the same effect is Apex Hosiery Co. v. Leader, 310 U.S. 469, 488:

> "The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute to labor unions has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute."

Ratification may take place either with or without reenactment of the statute or order in question. Reenactment or amendment, of course, makes the case for ratification stronger. See, for example, Hassett v. Welch, 303 U.S. 303, 312:

> ". . . the re-enactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it re-enacted."

Courts attach the same significance to amendment. In National Labor Relations Board v. John S. Barnes Corp., 178 F. 2d 156 (C.A. 7, 1949), involving authority to delegate power to issue subpoenas, the court noted that Congress was well aware that the Labor Board openly and consistently construed the Labor Act as authorizing the delegation of the power to issue subpoenas. Since Congress had amended the subpoena provision of the Labor Act in other respects, the court concluded that:

> "If Congress had not agreed with the Board's construction and the procedure being followed, the subpoena provisions could have been further amended to expressly prohibit the delegation of the subpoena power by the Board. Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when amending Section 11(1), must be considered as legislative ratification of the Board's construction and procedure." 178 F. 2d at 161.

But ratification of an administrative interpretation may be found without either reenactment or amendment of the governing statute or Executive Order. Thus, in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313, this Court declared that "Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years." The Court observed further:

> "The administrative practice developed before the act of 1922 has thus been continued and confirmed with the tacit approval of the President and the acquiescence of the Congress." 288 U.S. at 314-315.

Cf. Helvering v. Winmill, 305 U.S. 79, 83:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

The validity of Regulation 14 does not depend on tacit approval, however. At least two facts furnish positive evidence of ratification by the President. First, Executive Order 10450 expressly recognized that the Review Board was exercising jurisdiction under Regulation 14 over cases where the Department had not recommended dismissal on loyalty grounds. This demonstrates presidential knowledge of the Board's interpretation. Second, in 1951 Executive Order 9835 was amended in a respect not material here. To paraphrase National Labor Relations Board v. John S. Barnes Corp., supra, if the President, knowing of Regulation 14, had not approved it, he could have further amended Executive Order 9835 to bar post-audit reviews.

The doctrine of ratification, developed with respect to interpretation of acts of Congress by the executive department, applies a fortiorari to interpretation of presidential orders by subordinates. In the former situation the interpretation is by an independent branch of the Government, in no way controlled by the other branch and possibly dominated by the opposite political party. An executive order, on the other hand, is interpreted by persons or agencies appointed by the President and subject to control and/or removal by him. There is, therefore, far more reason to expect such an interpretation to be in harmony with the governing order than is true of interpretation of acts of Congress. Moreover, it is far more likely that the President has actual knowledge of a given administrative interpretation than that the Congress has such knowledge. In addition, since executive orders are easier to change than acts of Congress, the failure of the President to change an order is more convincing evidence of ratification than the failure of Congress to change a statute.

In the present case it is inconceivable that post-audit reviews, an administrative interpretation of the greatest significance to the major executive agencies, could have continued for so long had the chief executive not [redacted] authorized them. For the Court to hold in retrospect that the controversial and widely publicized practice of post-audit reviews was carried on from December, 1947 to the middle of 1953 without presidential acquiescence would be utterly unrealistic. A decision based on such a fiction would be particularly unfortunate in this case where the effect of past post-audit reviews both on the security of the nation and on the future lives of the Government employees involved can never be eradicated by the action of any court.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

JOHN P. PETERS, PETITIONER

v.

OVETA CULP HOBBY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

SIMON E. SOBELOFF,
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In the Supreme Court of the United States

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In *Bailey* v. *Richardson,* 182 F. 2d 46 (C. A. D. C.), the court below held that the removal of a Federal employee who is not in the classified civil service presents no justiciable question under the Constitution or under the statutes governing the appointment and separation of Government employees. It further held, assuming *arguendo* that the plaintiff in that case occupied a position in the classified civil service, that Executive Order 9835 (12 F. R. 1935), which established the President's Employees Loyalty Program, is constitutional. This Court affirmed by an equally

divided vote. 341 U. S. 918. Since the constitutional issues which petitioner seeks to raise in this case are identical to those decided in the *Bailey* case, the court below, on the authority of its earlier ruling, rejected petitioner's challenges to the validity of Executive Order 9835.

We recognize, of course, that, in view of the equal division in the *Bailey* case, the constitutional questions there considered have not been finally resolved by this Court and that it may wish again to examine the personnel security measures utilized in the Executive branch. However, we suggest that the present case is not appropriate for this examination.

1. Executive Order 9835 which petitioner here attacks is no longer in existence and the constitutional issues which the petition seeks to present now arise in an entirely different context. Executive Order 9835 was revoked and superseded in April 1953, by Executive Order 10450. 18 F. R. 2489. The Loyalty Review Board, whose decision petitioner challenges, was abolished (E. O. 10450, Sec. 12).[1] And the "disloyalty" standard under which the loyalty program was administered has been replaced. Executive Order 10450, carrying out the purpose of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1, *et seq.*), is keyed to the broader standard that appointment and

[1] In the circumstances, it is clear that this action is moot insofar as the respondent members of the defunct Loyalty Review Board are concerned.

retention in federal employment be "clearly consistent with the interests of the national security" (Secs. 2, 5, 6, 7, 8). Also of importance is the fact that, unlike the procedure under Executive Order 9835, the regulations issued by the Attorney General under Executive Order 10450 provide for an administrative hearing to determine whether an organization should be designated as within the purview of the Order. 18 F. R. 2619.[2] In the light of this Court's opinions in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, it would appear that the inability of either the employee or the organization under Executive Order 9835 to contest, in an administrative hearing, the propriety of a proposed designation of the organization by the Attorney General was a significant factor in the results reached in both the *Bailey* and *Joint Anti-Fascist Refugee Committee* cases. See e. g., 341 U. S. at 183–187 (Jackson, J., concurring).[3]

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[2] The validity of the current Order and of these regulations is now being challenged in the District Court for the District of Columbia. *National Lawyers Guild* v. *Brownell,* Civil Action No. 5494–53.

Section 41.1 (a) of the Attorney General's regulations issued under Executive Order 10450 provides that organizations previously listed under the prior program had 10 days within which to file a written notice of contest. 18 F. R. 2619.

[3] It should be noted that the complaint here specifically attacks petitioner's dismissal on this score: "The purported hearing was further conducted in violation of Executive Order 9835 in that the Inquiry Board on Employee Loyalty, Federal Security Agency, treated as evidence a purported 'listing' by the Attorney General of the United States of

2. Not only is the program petitioner attacks no longer in effect, but his status is far different from that of the mass of federal employees. It is undisputed that he did not occupy a position in the classified civil service (Tr. 28). Petitioner stipulated that he was a "temporary part-time or intermittent" employee (Tr. 27), a "Special Consultant * * * on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" (Tr. 27).[4] Accordingly, his status under the civil service laws was no higher than that of an applicant for employment. Cf. *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; 5 CFR (1949 ed.) 2.112. Even if it be assumed that a permanent employee has certain constitutional rights in retaining his job, there are good grounds for differentiating the case of one who has a status no higher than an applicant for employment. The latter's case should not be the vehicle for deter-

organizations within the purview of Executive Order 9835, Part III, § 3, Part V, § 2f, which purported 'listing' was not made 'after appropriate investigation and determination' as required by Executive Order 9835, Part III, § 3" (R. 10–11).

[4] The complaint alleges that his duties required his presence in Washington for about ten days each year (R. 3). The answer alleges that petitioner's presence in Washington was required from four to nine days each year (R. 15). The answer further alleges that his appointment as a Special Consultant was for a term expiring December 31, 1953 (R. 16).

mining the rights of regular Government employees.[5] Moreover, petitioner's term of appointment apparently expired on December 31, 1953 (see fn. 4), and he does not claim to be a present applicant for a federal position. See Pet. 7.[6]

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

OCTOBER 1954.

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[5] In calling the Court's attention to the temporary nature of petitioner's employment, we have not lost sight of the fact that the petitioner in the *Bailey* case technically also had the same status. However, the claims of a classified civil service employee were also before the Court at that time in a companion case. *Washington* v. *McGrath*, 341 U. S. 923. For that reason, the Government did not rely on the petitioner's status in the *Bailey* case. See Brief for Respondents, No. 49, October Term, 1950, p. 58, fn. 47.

[6] Petitioner's use of the phrase "stigma of a dishonorable discharge" (Pet. 8) may possibly be an attempt to predicate standing to sue on the common law tort of defamation. It should be noted, however, that unlike the *Joint Anti-Fascist Refugee Committee* case, 341 U. S. 123, there is no allegation here that respondents published the alleged defamation of petitioner.

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BRIEF FOR RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, PETITIONER

v.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia was entered without opinion (R. 25). The judgment of the Court of Appeals for the District of Columbia Circuit was also entered without opinion (R. 28).

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1954 (R. 28). The petition for a writ of certiorari was filed on September 29, 1954, and was granted on November 15, 1954 (R. 29). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was removed under Executive Order 9835, as amended, from his "temporary part-time or intermittent" federal employment as a "Special Consultant * * * on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" after a finding of reasonable doubt as to his loyalty to the Government of the United States. The questions presented by his removal are as follows:

1. Whether petitioner's removal from the federal service complied with the procedural requirements of Executive Order 9835, as amended by Executive Order 10241.

2. Whether Executive Order 9835, as amended by Executive Order 10241, was constitutional.[1]

EXECUTIVE ORDERS INVOLVED

Executive Order 9835 (12 F. R. 1935) and Executive Order 10241 (16 F. R. 3690) are set forth in full in the Appendix, *infra*.

STATEMENT

In this action, petitioner seeks a declaratory judgment that he was improperly removed from his position as a Special Consultant to the Public Health Service in the Department of Health, Education and Welfare, and an order directing

[1] This question is framed in the past tense in view of the fact that Executive Order 9835, as amended, was revoked and superseded in April, 1953, by Executive Order 10450 (18 F. R. 2489). See *infra*, p. 15.

his reinstatement (R. 13). His removal was effected under Executive Order 9835, as amended by Executive Order 10241, after a finding of reasonable doubt as to his loyalty to the Government of the United States (R. 8). Upon the authority of its prior decision in *Bailey* v. *Richardson*, 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918, the court below affirmed the entry of judgment on the pleadings for respondents. The provisions of the Executive Orders, the administrative action leading to petitioner's separation, and the judicial proceedings below are as follows:

1. THE EXECUTIVE ORDERS

a. *Executive Order 9835.*—Executive Order 9835 was issued by the President on March 21, 1947, "by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States". It recites that "each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States;" that "it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States"; that "the presence within

the Government service of any disloyal or subversive person constitutes a threat to our democratic processes;" and that "maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government." To achieve these ends the Executive Order was promulgated "in the interest of the internal management of the Government".

Part I of the Order directs a loyalty investigation of every person entering the civilian employment of any department or agency of the Executive branch of the government (Section 1). The investigation may be conducted after the person enters upon actual employment but in such case his appointment is conditioned upon a favorable determination with respect to his loyalty (Section 2). Provision is made as to the sources of information to be consulted and as to the circumstances in which a full field investigation is to be conducted (Sections 3, 4).

Part II of the Order relates to investigation and removal of existing employees. It provides that the head of each department and agency "shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency" (Section 1). It

directs the appointment within the department or agency of loyalty boards having the function of making recommendations with respect to removals on grounds relating to loyalty. It provides that any person charged with disloyalty shall have a right to an administrative hearing before such a loyalty board and may appear before the board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf. It further provides that written notice of such a hearing shall be given and that the employee shall be informed of the nature of the charges against him in sufficient detail to enable him to prepare his defense. "The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The employee is to be informed of his right to reply to such charges, and his rights to a hearing at which he may appear and present evidence (Section 2). A recommendation of removal by a loyalty board is subject to appeal to the head of the employing department or agency or persons designated by him. The decision of the department or agency head is in turn subject to appeal to the Loyalty Review Board of the Civil Service Commission for an advisory recommendation (Section 3). The order expressly provides that these rights of hearing, notice and appeal are to be accorded to

every officer or employee "irrespective of tenure, or of manner, method, or nature of appointment" (Section 4).

Part III provides for the establishment in the Civil Service Commission of a Loyalty Review Board. The Board is authorized to review cases involving persons recommended for dismissal on grounds relating to loyalty which may be referred to it either by the employing department or agency or the officer or employee concerned, and to make advisory recommendations thereon to the head of the employing department or agency. It is also empowered to make rules and regulations relating to employee loyalty, to advise departments and agencies on loyalty problems, to coordinate their loyalty policies and procedures and to disseminate information, make reports and submit recommendations relating to the loyalty program (Section 1). An index of all persons on whom loyalty investigations have been made since September 1, 1939 is to be maintained (Section 2). The Attorney General is directed to furnish the Board with a list of organizations found by him to fall within certain categories (see p. 8 *infra*) and the Board is directed to disseminate that information to all departments and agencies (Section 3).

Part IV provides that an investigative agency shall make available on request to the head of any department or agency all information con-

cerning any employee or prospective employee (Section 1). It further provides, however, that:

> the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requested department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed [Section 2].

Part V prescribes the standard for refusal of employment or removal from employment. The controlling standard was that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Section 1). As a guide in the application of this test the order specifies certain activities and associations of an applicant or employee "which may be considered in connection with the determination of disloyalty." These activities include—

> *a.* Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> *b.* Treason or sedition or advocacy thereof:

plicable standard was that prescribed by Executive Order 9835, as amended by Executive Order 10241 (R. 20). The Chairman declined to specify where the burden of proof lay but declared that the panel would reach its own conclusion upon all the evidence as to whether there was a reasonable doubt of petitioner's loyalty (R. 19, 20).

Petitioner testified again in his own behalf. He denied membership in the Communist Party, discussed his political beliefs and his motives for engaging in the activities and associations which were the subject of the charges, and answered all questions put to him by the panel (R. 20–21). Five witnesses also testified in his behalf. Three of them—Ex-President Charles W. Seymour of Yale University, C. M. Hugh Long, former dean of the Yale Medical School, and Circuit Judge Charles E. Clark—had testified at the previous hearing (R. 8, 21). Each of the five witnesses stated his acquaintance with petitioner over a period of several years and his firm conviction of petitioner's loyalty (R. 21).

In addition to the evidence adduced by petitioner's counsel, the record before the panel contained information supplied by informants whose identity was not disclosed to petitioner (R. 20, 21). The identity of one or more, but not all, of these informants was known to the panel (R. 20). The panel expressly declined the request of petitioner's counsel to reveal the identity of the in-

formant who had given information relating to Charge No. 1 (R. 20).

By letter dated May 22, 1953, Bingham advised petitioner that the panel had determined that "on all the evidence, there is a reasonable doubt as to Dr. Peter's loyalty to the Government of the United States" (R. 8). The letter further stated that respondent Oveta Culp Hobby, the Secretary of the Department of Health, Education and Welfare, had been notified of the Loyalty Review Board's finding and recommendation that petitioner be removed from his position (R. 8). In addition, the letter informed petitioner that, pursuant to Civil Service Rule V, Section 5.101 (a) (5 C. F. R. (1954 Supp.) 5.101 (a)),[4] he had

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[4] "§ 5.101 *Persons disqualified for appointment.* (a) Persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104 (a) (1) through (8) of this chapter, may, in the discretion of the Commission, be denied examination, or be denied any of the types of appointment listed in Civil Service Rule II, § 2.112 (a) (1) through (7) of this chapter, namely, original probational, reappointment, reinstatement, temporary appointment, inter-agency transfer, conversion from excepted, war service indefinite or temporary indefinite appointment to competitive appointment, and indefinite appointments under Parts 2, 7, and 8 of this chapter, for a period of not more than 3 years from the date of the determination of such disqualification: *Provided*, That no person shall be admitted to competitive examination, nor shall he be employed in any position in the competitive service within 3 years after a final determination that he is disqualified for Federal employment because of a reasonable doubt as to his loyalty to the Government of the United States."

been barred from the federal service for a period of three years from May 18, 1953, and that any and all pending applications or eligibilities were therewith cancelled (R. 21, 22).

On June 12, 1953, the Surgeon General of the Public Health Service notified petitioner of his separation from his position as a Special Consultant, effective June 12, 1953 (R. 21). On June 15, 1953, respondent Hobby denied petitioner's request that the transcript of the hearings be remanded to the Loyalty Review Board to permit the filing of a motion for rehearing before the full Board (R. 22). On September 25, 1953, Nelson A. Rockefeller, Under Secretary of the Department of Health, Education, and Welfare, advised petitioner's counsel that respondent Hobby had given due consideration to petitioner's case, that a discussion with counsel would not seem to be of assistance, but that if counsel desired to submit a brief on legal or procedural questions, it would be received and considered (R. 22).

3. PROCEEDINGS BELOW

On February 18, 1954, petitioner brought this action for injunctive and declaratory relief against the Secretary of the Department of Health, Education, and Welfare, the members of the Civil Service Commission, and the members of the panel of the Loyalty Review Board who had heard his case (R. 2–14). Petitioner sought a declaratory judgment that he had been im-

properly removed from his position and is entitled to reinstatement; an order directing his reinstatement; an order directing the members of the Commission to expunge from its record the finding of the Loyalty Review Board panel that there was reasonable doubt as to his loyalty to the Government of the United States; and an order directing the members of the Commission to expunge from its record the ruling that petitioner has been barred from federal service for a period of three years from May 18, 1953 (R. 13–14).

The complaint alleged that the procedure followed in effecting his removal did not comply in several respects with the requirements of Executive Order 9835, as amended by Executive Order 10241 (R. 9–12), and that the actions taken by respondents were unconstitutional in that they deprived petitioner of liberty and property without due process of law, violated his right of freedom of speech and opinion, and contravened the prohibition against Bills of Attainder and *ex post facto* laws (R. 12–13).

After respondents had filed their answer, petitioner moved for judgment on the pleadings (R. 23–24). In turn, respondents cross-moved for judgment on the pleadings (R. 24–25).[5] The

[5] In part, respondents' motion pointed out that the cause is moot as to respondents Hessey, Amen, and King since the Loyalty Review Board is no longer in existence, having been abolished by Executive Order 10450. See *supra*, p. 15.

district court denied petitioner's motion, granted respondents' motion, and entered judgment on the pleadings for respondents (R. 25). On appeal, the cause was presented to the court below on petitioner's motion to enter judgment on the merits without formal briefs or argument. The parties agreed that this action presented the same issues decided by that court in *Bailey* v. *Richardson,* 182 F. 2d 46, affirmed by an equally divided court, 341 U. S. 918. Feeling "obliged to follow the ruling in that case in the determination of the present case," the court below granted petitioner's motion for the entry of judgment without formal briefs or argument and affirmed the judgment entered for respondents by the district court (R. 28).

SUMMARY OF ARGUMENT

As we understand petitioner's position, petitioner does not question the necessity for the utilization of personnel security measures in the Executive Branch nor the constitutional authority of the President to adopt some form of personnel security program. Rather, petitioner's complaint is that the specific measures devised by the President—if construed to have authorized the procedure followed herein—are unconstitutional. As in *Galvan* v. *Press,* 347 U. S. 522, petitioner's contentions must be assessed in the light of history.

I

A. From the beginning of our constitutional history, the appointment to and removal from federal office has always been regarded as a matter for Executive discretion. The courts have construed Acts of Congress as limiting the Executive power of removal only where such a limitation was imposed by clear and express language. Where such a limitation was found to exist, judicial inquiry has been restricted to the question of compliance with statutory requirements. In the absence of legislative or administrative limitations, the courts have held that appointments and dismissals present no justiciable issue. This doctrine has been based on the reluctance of the courts to interfere with the Executive Branch in the performance of its constitutional function, and on the view that, except as Congress may otherwise provide, Government employees hold office only at the pleasure of their superior.

B. This record of some one hundred-and-sixty years speaks with great force. Never in our history has it been thought that a Government employee could not be dismissed without a hearing which meets the procedural requirements of the Fifth Amendment. Indeed, legislative enactments restricting the grounds for dismissal have never purported to require such a hearing. Employees have been dismissed for such offences as acceptance of bribes, theft of Government docu-

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ments and attempts at seduction by force without such a hearing. And petitioner concedes that no constitutional issues would be raised by the complete repeal of all civil service protection of Government employees. (Pet. Br. 15). Petitioner's contention that dismissal for disloyalty is in a different category is without merit. His reliance on *United States* v. *Lovett,* 328 U. S. 303, in this connection is misplaced. The subsequent decisions of this Court in *United Public Workers* v. *Mitchell,* 330 U. S. 75, *American Communications Assn.* v. *Douds,* 339 U. S. 382, and *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, establish that the *Lovett* case does not prevent general regulation of the qualifications for federal office or require a judicial or quasi-judicial hearing in cases of dismissal for failure to meet those qualifications.

Wieman v. *Updegraff,* 344 U. S. 183, is similarly distinguishable. Nothing in that decision suggests that the legislature or the Executive lacks power to prescribe reasonable qualifications for federal employment or to dismiss those who fail to satisfy such qualifications. In particular, it is implicit in the Court's opinion in that case that loyalty to the Government of the United States is a reasonable qualification for public employment. Further, the vice found in the Oklahoma statute there involved, *i. e.* indiscriminate classification of innocent with knowing ac-

tivity, is not present here. To the contrary, the terms of the Executive Order and the implementing regulations demonstrate that, on this score, the Order is comparable to the statutes which were upheld by this court in *Garner* v. *Board of Public Works, supra, Adler* v. *Board of Education,* 342 U. S. 485, and *Gerende* v. *Board of Supervisors,* 341 U. S. 56, as fixing reasonable qualifications for public office.

Insofar as petitioner has been injured by the "stigma" to his reputation, we see no basis for holding that that stigma is a thing apart, which gives rise to constitutional rights not applicable to other dismissals from Government service. In comparable fields, this Court has held that equivalent individual interests may validly be invaded without a due process hearing. Cf. *United States* v. *Nugent,* 346 U. S. 1; *Shaughnessy* v. *Mezei,* 345 U. S. 206; *Knauff* v. *Shaughnessy,* 338 U. S. 537. Of particular importance here, the Court held in those cases that, in view of the plenary character of the power in question, Executive action may constitutionally be based on confidential information. We submit that the plenary power of the Executive over the tenure of employees is no less firmly embedded in the tissues of our body politic and that the Due Process Clause is no less inapplicable.

Assuming, *arguendo,* however, that *Wieman* v. *Updegraff, supra,* must be read as holding that

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI directs each department and agency to submit to the Federal Bureau of Investigation names of all its incumbent employees. The Bureau is to check such names against its records

and to notify each department and agency of those persons as to whom there is substantial evidence of activities or associations coming within the categories enumerated above. Upon receipt of such information the department or agency shall make or cause to be made such investigation of those employees as the head of the department or agency shall deem advisable (Section 1). Additional provisions are made with respect to the handling and transmission of confidential documents and information (Section 2). The Order is not to be applicable to persons summarily removed under the provisions of any statute conferring the power of summary removal (Section 3).

b. *Executive Order 10241.*—On April 28, 1951, Section 1 of Part V of Executive Order 9835—the standard for refusal of employment or removal from employment—was amended by Executive Order 10241. As amended, the standard to be applied was whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." The amended standard readopted, in substance, the standard which had been in effect throughout World War II, *i. e.*, War Service Regulation II, Section 3 (issued by the Civil Service Commission in 1942, 7 F. R. 7723, 5 CFR (Cum. Supp.) 18.2 (c)), which had provided that an applicant may be denied ap-

pointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." See *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838.

2. ADMINISTRATIVE ACTION LEADING TO PETITIONER'S REMOVAL

Petitioner is a professor of medicine at Yale University (R. 15). Because of his eminence in the field of medical science, he had been employed for several years prior to 1953 as a "Special Consultant in the Public Health Service, Department of Health, Education and Welfare, on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" (R. 27). At the time of his removal, he was serving under an appointment tendered on August 21, 1951, for a term expiring December 31, 1953 (R. 16). His duties in the capacity of Special Consultant required his presence in Washington for four to ten days each year to advise the Surgeon General with respect to proposals to grant federal assistance to medical research institutions under the Public Health Laws (R. 3, 15, 27). In accordance with Civil Service regulations pertaining to "temporary part-time or intermittent employment for consultation purposes," petitioner did not have com-

petitive status and was not in the classified civil service (R. 27).[2]

By letter dated January 7, 1949, Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Federal Security Agency,[3] informed petitioner that information re-

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[2] In Respondents' Memorandum in Opposition, it was suggested that the present case did not warrant further review for the reason that, *inter alia*, petitioner's "status is far different from that of the mass of federal employees" (p. 4). Petitioner's Reply Memorandum states (p. 2, n. 2): "At the risk of quarrelling over numbers, we might point out that of the 2,344,383 paid civilian employees in the executive branch of the Federal Government on June 30, 1953, only 1,014,017—or 43% of them—were covered by the Classification Act of 1949, 5 U. S. C. §§ 1071 *et seq.*, 63 Stat. 964, as amended. Pay Structure of the Federal Civil Service, June 30, 1953, Civil Service Commission Pamphlet 33–5, p. 19 (September 1954)". While petitioner's statement is statistically correct, it is wholly misleading and not responsive to respondents' observation. The number of employees covered by the Classification Act of 1949 for salary purposes and the number of employees in the classified civil service are two separate and distinct matters. In fact, of the 2,156,124 civilian employees in the executive branch in August 1954, 1,948,805—or approximately 90% of them—were in the competitive service. See U. S. Civil Service Commission, *Federal Employment Statistical Bulletin*, August 1954, Table 3, p. 4; see also U. S. Civil Service Commission, *Graphic Presentation on Federal Employment*, November 1954, pp. 4, 10, 11.

[3] Prior to April 10, 1953, the functions of the Department of Health, Education, and Welfare were performed by the Federal Security Agency. On that date, pursuant to Reorganization Plan No. 1 of 1953 and P. L. 13, 83d Cong., 1st Sess. (67 Stat. 18), the Federal Security Agency was designated as the Department of Health, Education, and Welfare.

lating to his loyalty had been received and enclosed an interrogatory relating thereto (R. 4). The interrogatory specified particular acts and associations of petitioner with specified organizations, movements and meetings (R. 16). Petitioner answered this communication under oath on January 17, 1949 (R. 4). On or about February 18, 1949, McElvain advised petitioner that it had been determined that no reasonable grounds existed for belief that petitioner was disloyal to the Government of the United States—the standard prescribed by Executive Order 9835 (R. 4).

As noted above, p. 9, on April 28, 1951, the standard prescribed by Executive Order 9835 was amended by Executive Order 10241. On May 21, 1951, L. V. Meloy, Executive Secretary of the Loyalty Review Board advised McElvain that petitioner's case should be reopened and readjudicated pursuant to Executive Order 10241 (R. 16). Subsequently, on August 17, 1951, Burton L. French, Acting Chairman of the Loyalty Review Board, informed McElvain that a panel of the Board had considered the complete file in petitioner's case, had concluded that the derogatory material contained in the file was too serious to justify adjudication of the case on the basis of the interrogatory, and therefore recommended that a letter of charges be issued to petitioner and a hearing held thereon (R. 17).

Pursuant to this recommendation and to the receipt of new information bearing on petitioner's loyalty (R. 17), a letter of charges was sent to petitioner by McElvain on December 17, 1951 (R. 4). Sixteen charges were specified, relating to purported membership in the Communist Party, sponsorship of certain petitions, affiliation with certain organizations, and alleged association with members of, and sympathizers with, the Communist Party (R. 4). The letter advised petitioner that he might answer the charges in writing within ten days and that he had a right to an administrative hearing at which he might present evidence in his behalf (R. 4).

Petitioner replied under oath to the letter of charges on December 26, 1951 (R. 4). On March 13, 1952, McElvain transmitted to petitioner's counsel a written statement of certain information in the possession of the Federal Security Agency's Board of Inquiry on Employee Loyalty as to the particular acts and associations of petitioner with specified organizations, movements and meetings. The statement noted that certain of these items of information had been received from confidential informants (R. 17–18).

On April 1 and 2, 1952, the Federal Security Agency's Board of Inquiry on Employee Loyalty conducted a hearing in New Haven, Connecticut (R. 5, 18). The hearing was attended by peti-

tioner in person and by his counsel (R. 18). The Chairman of the Board advised petitioner that the charges which had been served would not be considered as evidence (R. 18). The sources of the information as to the facts bearing on the charges were not identified or made available to petitioner's counsel for cross examination. The identity of one or more of the informants furnishing the information, but not of all the informants, was known to the Board (R. 18). The Board did not know whether the information given by a confidential informant as to the facts bearing on Charge No. 1 had been given under oath (R. 18).

At the hearing, petitioner testified under oath that he had never been a member of the Communist Party and also testified with respect to the other charges (R. 19). He did not refuse to answer any question directed to him (R. 19). Eighteen witnesses who were called by petitioner also testified, and petitioner submitted affidavits, letters or statements by some forty additional persons (R. 19). No witness testified that petitioner was disloyal (R. 18).

By letter dated May 23, 1952, from McElvain, petitioner was notified that the Board of Inquiry had determined that, on all the evidence, there was no reasonable doubt as to petitioner's loyalty to the Government of the United States—the standard established by Executive Order 10241 (R. 5–6).

Thereafter, on April 6, 1953, pursuant to Regulation 14 of the Loyalty Review Board, Hiram Bingham, Chairman of the Loyalty Review Board, informed petitioner that that Board had determined to conduct a post-audit of the action of the Board of Inquiry and, to this end, "hold a hearing and reach its own decision" (R. 6).

On April 27, 1953, Executive Order 9835, as amended by Executive Order 10241, was revoked and superseded by Executive Order 10450 (18 F. R. 2489), effective May 27, 1953. Section 11 of the new Order provided that cases pending before the Loyalty Review Board on the effective date of the Order were to be heard to final determination in accordance with the provisions of Executive Order 9835, as amended. For this purpose, Section 12 of the new Order provided that the Loyalty Review Board was to continue and function for a period of one hundred and twenty days from the effective date of the Order.

Pursuant to this authority, on May 12, 1953, a panel of the Loyalty Review Board, composed of respondents John H. Hessey, Sr., John H. Amen, and Willard L. King, conducted a hearing in New Haven, Connecticut (R. 6). At the hearing, the Chairman of the panel advised petitioner's counsel that Charge No. 9, which had been dismissed in the previous hearing, would not be considered (R. 19); that the record in the previous hearing would be made a part of the evidence of record in the present hearing (R. 19, 20); and that the ap-

ment of inferior federal officers (Constitution, Art. II, Sec. 2), may validly limit it by general legislation. *Myers* v. *United States*, 272 U. S. 52.

The fundamental nature of that power, and the extreme reluctance of the courts to permit any restriction on it, are illustrated by the cases involving the validity and extent of attempted legislative regulations. While it is established that Congress has some power to regulate the terms and conditions of employment of inferior federal officers (*United States* v. *Perkins*, 116 U. S. 483), the courts in construing and applying such legislation have repeatedly stressed the importance of preserving the executive prerogative unimpaired, and have insisted that that prerogative can be limited, if at all, only by the most express language. Thus, in *Parsons* v. *United States*, 167 U. S. 324, a statutory provision of a four year term of office was held not to oust the President's power of removal before the end of that term. In *Shurtleff* v. *United States*, 189 U. S. 311, a statutory provision for removal from office for inefficiency, negligence of duty or malfeasance in office was held not to preclude a removal without notice or hearing and for no assigned cause. Finally, in *Myers* v. *United States*, 272 U. S. 52, this Court, while recognizing the power of Congress to regulate removals of departmental employees, held that Congress was without constitutional power to limit the Presi-

dent's "unrestricted power of removal" (272 U. S. at 176) of officers appointed by the President with the consent of the Senate.[9]

These cases deal with conflicts between the legislature and the executive over the removal power—a problem not presented here since petitioner does not, and cannot, contend that the tenure of his employment was governed by any Act of Congress.[10] They are significant however, as demonstrating clearly the scope of the executive power of removal and the reluctance of the courts to countenance interference with that power.

In the absence of legislative restraint upon the executive's discretionary power to remove inferior government officers and employees, the courts have consistently refused, since the founding of

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[9] The limitations placed on this decision by *Humphrey's Executor* v. *United States*, 295 U. S. 602, with respect to legislative power over independent regulatory commissions are irrelevant for present purposes.

[10] As noted in the Statement, *supra*, pp. 10–11, petitioner did not have competitive status and was not in the classified civil service (R. 27). Accordingly, the Lloyd-LaFollette Act (37 Stat. 555) which applies only to persons "in the classified civil service" (5 U. S. C. 652) has no application. Similarly, although the complaint is silent as to petitioner's possible service in the Armed Forces, the Veterans' Preference Act of 1944 (58 Stat. 387) is equally inapplicable. That Act affords protection only to "permanent or indefinite" employees (5 U. S. C. 863), and it is conceded that petitioner was engaged in "temporary part-time or intermittent employment" (R. 27).

the Republic, to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that the mandate of Congress has been complied with. At no time have the courts intervened to review the basis for executive action or to substitute their judgment for that of the officials. *Eberlein* v. *United States*, 257 U. S. 82; *Burnap* v. *United States*, 252 U. S. 512; *Brown* v. *Lane*, 232 U. S. 598; *Reagan* v. *United States*, 182 U. S. 419; *Keim* v. *United States*, 177 U. S. 290; *White* v. *Berry*, 171 U. S. 366; *Crenshaw* v. *United States*, 134 U. S. 99; *In re Sawyer*, 124 U. S. 200; *Matter of Hennen*, 13 Peters 230; *United States* v. *Guthrie*, 17 How. 284.[11]

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[11] For illustrative cases subsequent to the *Bailey* case, *supra*, see also *Williams* v. *Cravens*, 210 F. 2d 874 (C. A. D. C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C. A. D. C.), certiorari denied, 346 U. S. 937; *Blackmon* v. *Lee*, 205 F. 2d 13 (C. A. D. C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C. A. D. C.); *Watson* v. *Pace*, 201 F. 2d 713 (C. A. D. C.), affirming 101 F. Supp. 477 (D. D. C.); *Kirkpatrick* v. *Gray*, 198 F. 2d 533 (C. A. D. C.), certiorari denied *sub nom. Priestly* v. *Donaldson*, 344 U. S. 880; *Powell* v. *Brannan*, 196 F. 2d 871 (C. A. D. C.); *Deviny* v. *Campbell*, 194 F. 2d 876 (C. A. D. C.), certiorari denied, 344 U. S. 826; *Ciaffone* v. *United States*, 126 C. Cls. 532; *McNulty* v. *United States*, 126 C. Cls. 573; *Engelhardt* v. *United States*, 125 C. Cls. 603; *Palmer* v. *United States*, 121 C. Cls. 415; *Blum* v. *United States*, 120 C. Cls. 232; *Love* v. *United States*, 119 C. Cls. 486, certiorari denied, 342 U. S. 866; *Croghan* v. *United*

Such non-intervention in the field of personnel administration is, of course, merely one application of the long-recognized principle that "the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of

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States, 116 C. Cls. 577; *Dupre* v. *United States*, 116 C. Cls. 660.

For earlier precedents, see also *Carter* v. *Forrestal*, 175 F. 2d 364 (C. A. D. C.); *Levy* v. *Woods*, 171 F. 2d 145 (C. A. D. C.); *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C. A. D. C.); *Maghan* v. *Board of Commissioners of the District of Columbia*, 141 F. 2d 274 (C. A. D. C.); *Hammond* v. *Hull*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lamp*, 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Simon*, 269 Fed. 715 (C. A. D. C.); *United States ex rel. Nalle* v. *Hoover*, 31 App. D. C. 311; *United States ex rel. Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal*, 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Gadsden* v. *United States*, 111 C. Cls. 487; *Ginn* v. *United States*, 110 C. Cls. 637; *Weinstein* v. *United States*, 109 C. Cls. 579; *Culligan* v. *United States*, 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States*, 105 C. Cls. 280; *Bratton* v. *United States*, 90 C. Cls. 604; *Bennett* v. *United States*, 89 C. Cls. 322; *Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States*, 55 C. Cls. 174; *Lellmann* v. *United States*, 37 C. Cls. 128.

nothing but mischief; and * * * that such a power was never intended to be given to them." *Decatur* v. *Paulding,* 14 Pet. 497, 516.[12] The executive and legislative branches of the Government are constitutionally responsible for the ability, integrity and loyalty of the personnel of the executive branch. That responsibility of necessity comprehends the power to remove those not qualified. No function is more internal to the executive branch than the selection and retention or dismissal of its employees.[13] As the court

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[12] See also *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

[13] "The framers of our Constitution had one essential feature of efficient government clearly in mind. They gave to the Executive officer charged in law with the responsibility and actually charged by the people with the responsibility of carrying on the Executive department of the government, the power and means of meeting that responsibility. They vested in him complete power to appoint all the officers of the government who were subordinate to him, and upon whose political capacity and governmental discretion would depend the wise carrying out of his policies. They gave him the power of absolute removal, and they placed in his hands

below succinctly observed in the *Bailey* case, *supra,* "the judiciary cannot assume responsibility for the sufficiency of the qualifications of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power." (182 F. 2d at 62.)

The inappropriateness of judicial inquiry into the ground of removal of a public officer or employee is further manifested by the nature of public office. It has been held repeatedly that the appointment to and the tenure in public office are not contract or property rights. *Taylor and Marshall* v. *Beckham,* 178 U. S. 548; *Crenshow* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Butler* v. *Pennsylvania,* 10 How. 402; see 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1. As this Court early declared (*Matter of Hennen,* 13 Pet. 230, 258):

> All offices, the tenure of which is not fixed by the constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the govern-

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the control of the action of all those who took part in the discharge of the political duties of the executive department. They acted on a sound political principle * * *." Taft, *Our Chief Magistrate and His Powers* (1916), p. 76.

> ment, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

In light of these considerations, it is readily apparent why this Court early announced that, if the office is held at the discretion of the appointing authority, "this court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; * * *." *Matter of Hennen, supra,* at 261.

Although the advent of Civil Service laws and regulations have, to some extent, limited executive discretion over removal, judicial abstention from interference with those acts within the scope of exeeutive discretion has been uniformly affirmed. Thus, the courts have intervened to enforce compliance with specific procedural steps required by law and regulations. *United States* v. *Wickersham,* 201 U. S. 390; *Mulligan* v. *Andrews,* 211 F. 2d 28 (C. A. D. C.); *Manning* v.

Stevens, 208 F. 2d 827 (C. A. D. C.); *Money* v. *Anderson,* 208 F. 2d 34 (C. A. D. C.); *Kutcher* v. *Gray,* 199 F. 2d 783 (C. A. D. C.); *Deak* v. *Pace,* 185 F. 2d 997 (C. A. D. C.); *Borak* v. *Biddle,* 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Stringer* v. *United States,* 117 C. Cls. 30; *Wittner* v. *United States,* 110 C. Cls. 231; *Elchibegoff* v. *United States,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694. Where, however, such procedural steps have been taken, judicial inquiry into the basis for or propriety of removal has been consistently refused. See cases cited *supra,* pp. 34–35.

Thus, in *Keim* v. *United States,* 177 U. S. 290, where an employee had been discharged as inefficient, this Court refused to consider the contention that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship," stating (p. 296):

> These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

dismissals on loyalty grounds are subject to the requirements of procedural due process, we submit that the procedures followed here fully meet those requirements. It is well settled that due process is not a technical conception with a fixed content unrelated to time, place and circumstances. In essence, the problem is one of balancing the conflicting individual and national interests involved. In the instant situation, national security demands that certain types of information be kept confidential and that the employee be denied confrontation and cross-examination of confidential informants. Balancing the conflicting interests involved, we submit that due process does not compel the Government to choose between disclosure and retention of employees as to whose loyalty there is a reasonable doubt.

C. Petitioner's assertion that the Executive Order invades rights guaranteed under the First Amendment is similarly without substance. Like measures have been taken in every other time of national crisis presenting issues of possible disloyalty in the federal service. Moreover, the consistent practice over much of our history has been to base appointments to and dismissals from the federal service primarily on political opinions—a practice which was never thought to present any constitutional issue or other justiciable question. Assuming, however, that a justiciable question is

presented under the First Amendment, we think it clear that the Order is valid under the principles announced in *Adler* v. *Board of Education, supra, Garner* v. *Board of Public Works, supra, Gerende* v. *Board of Supervisors, supra,* and *United Public Workers* v. *Mitchell, supra.*

II

Petitioner's contention that the procedure here followed was inconsistent with the terms of the Executive Order is also without foundation. He asserts that the use in that Order of the words, "hearing" and "evidence" presupposes a judicial or quasi-judicial hearing and that because he was not allowed to confront the confidential informants on whose information the loyalty boards relied, he was denied such a hearing. The Order, however, contemplated that in many cases the decision would turn on information which considerations of national security required to be kept confidential and not disclosed to the affected employee. It accordingly expressly provided for such disclosure as was consistent with national security. Further, the rights of employees were explicitly defined in the Order. An employee had the right to appear personally, to be accompanied by counsel of his choosing, and to present evidence on his behalf, by witnesses or affidavit. No other rights normally incident to a judicial or quasi-judicial hearing were specified. And such

other rights could not have been conferred consistently with the Presidential mandate that the identity of confidential informants be kept secret.

ARGUMENT

INTRODUCTORY STATEMENT

This is the most recent of a series of cases which have come before this Court involving the validity of various aspects of Executive Order 9835, which, as noted in our memorandum in opposition, was revoked and superseded in April 1953, by Executive Order 10450 (18 F. R. 2489). *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,[6] involved the application of those provisions of the Order which called upon the Attorney General to designate, for the guidance of the Loyalty Review Board and the heads of departments and agencies in determining the suitability of individuals for federal employment, those organizations found by the Attorney General to come within certain categories prescribed by the Order. *Bailey* v. *Richardson*, 341 U. S. 918,[7] involved the application of those provisions of the Order which directed the refusal to hire, or the dismissal of, federal employees as to whom it was found, in accordance with procedures estab-

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[6] Together with Nos. 7 and 71, October Term, 1950, *National Council of American-Soviet Friendship, Inc.* v. *McGrath*, and *International Workers Order, Inc.* v. *McGrath*.

[7] Together with *Washington* v. *McGrath*, 341 U. S. 923.

lished by the Order, that there was reasonable doubt of loyalty to the United States.

By reason of this Court's division of opinion in those cases, the constitutional issues therein raised were not finally resolved by this Court. The present case raises the identical issues presented in the *Bailey* case. Petitioner here, as did petitioner in the *Bailey* case, asserts that the procedure followed in effecting his dismissal was in conflict with the provisions of Executive Order 9835; that the Order, as applied, violated rights to procedural due process guaranteed by the Fifth Amendment; that it violated rights of free speech and assembly guaranteed by the First Amendment; and that it violated the constitutional prohibitions against Bills of Attainder and *ex post facto* laws (R. 9–13).

As we understand petitioner's position, petitioner does not question the necessity for the utilization of personnel security measures in the Executive Branch nor the constitutional authority of the President to adopt some form of personnel security program. Rather, petitioner's complaint is that the specific measures devised by the President—if construed to have authorized the procedure followed herein—are unconstitutional.

In this posture, we think it unnecessary to rehearse in this brief the detailed statement set forth at pp. 24–55 of the Brief for Respondents in the *Bailey* case (No. 49, October Term, 1950)

with respect to the circumstances leading to the promulgation of Executive Order 9835. Suffice it to say, not merely two ideologies but two adverse forces presently coexist. And it is by now obvious that infiltration of government service is an established technique of the world communist conspiracy for the overthrow of Government.[8] In the circumstances, there can be no doubt of the reasonable basis for the executive judgment that our government must protect itself against the presence within the federal service of any person as to whom there is a reasonable doubt of loyalty to the United States. See *infra,* pp. 83–87.

Turning then to the specific measures adopted by the President to insure the security of the United States and reversing the order in which petitioner has presented his objections thereto, we shall discuss first his attacks upon the constitutionality of Executive Order 9835, as amended, and shall consider in Part II of this brief his contention that the particular procedure followed in this case was in conflict with requirements of the Order.

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[8] See *e. g., Interlocking Subversion in Government Departments,* Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., July 30, 1953.

I

PETITIONER'S CONTENTIONS AS TO THE UNCONSTITUTIONALITY OF EXECUTIVE ORDER 9835, AS AMENDED, ARE WITHOUT MERIT

In *Galvan* v. *Press*, 347 U. S. 522, this Court upheld the constitutionality of Section 22 of the Internal Security Act of 1950, providing for the deportation of any alien who has been a member of the Communist Party at any time after entry, as applied to a resident alien shown to have been willingly a member of the Communist Party from 1944 to 1946 although not shown to have been aware of its advocacy of violent overthrow of the Government. In reaching that result, the Court observed that "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation" (*id.* at 530–531).

The Court pointed out, however, that "the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, but a whole volume. Policies

pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. * * * that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation" (*id.* at 531).

These observations are, we believe equally compelling here. Much can be said for petitioner's view, were the slate clean, that the scope of political discretion vested in the Executive and in the Congress by the Constitution in regulating the appointment and tenure of federal employees is narrowly circumscribed by constitutional prohibitions. But here, as in the *Galvan* case, the slate is not clean. The scope of the executive power challenged by petitioner bears the impressive gloss of not just a page of history but the record of some one hundred-and-sixty years, the writing of which has been shared by all three branches of our Government.

Although petitioner seeks to raise a broad range of constitutional issues, the nature of his action is not novel. As we shall show, its disposition is controlled by the familiar principle, estab-

lished in countless cases involving removal of federal officers and employees, that such a removal is an executive act over which the courts have no general revisory power. Since "'the judicial Power' with which alone this Court is invested comes into operation only as to issues that the long tradition of our history has made appropriate for disposition by judges" (Frankfurter J., concurring in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 416) we turn first to a consideration of the traditional scope of judicial action in this field.

A. THE APPOINTMENT AND REMOVAL OF GOVERNMENT EMPLOYEES IS A MATTER OF EXECUTIVE DISCRETION WHICH IS SUBJECT TO JUDICIAL REVIEW ONLY FOR COMPLIANCE WITH APPLICABLE STATUTES OR REGULATIONS

From the beginning of our constitutional history, it has been settled that questions of tenure of office are basically not judicial questions, except as Congress may impose statutory requirements which become judically enforcible. Responsibility for the quality of government officers and employees is vested by the Constitution in the executive and legislative branches. Art. II, Secs. 2, 3. In particular, it has been settled since the debates in the first Congress that the President has a discretionary power of removal, derived from the nature of his executive office, which is unrestricted except as Congress, in the exercise of its power to provide for the appoint-

> fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

These distinctions were further elaborated upon in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716. The Court there pointed out that "punishment is a prerequisite" of a bill of attainder and that "[w]hether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation'" (*id.* at 722). It concluded that punishment is not imposed "by a general regulation which merely provides standards of qualification and eligibility for employment" (*ibid*).

The Court's observations in the *Douds* and *Garner* cases are precisely applicable here. Petitioner was dismissed from his employment because it was the considered judgment of the President that beliefs, associations and activities such as the Loyalty Review Board concluded he possessed rendered an employee unqualified for public office. His dismissal was preventative, not

punitive. The loyalty program was instituted because the President had substantial reason to believe that government employees who came within the categories prescribed in Executive Order 9835 constituted a potential threat to our system of Government. It did not purport to punish past conduct; it looked to a present condition—whether there "is" reasonable doubt of an employee's loyalty—as a basis for predicting the likelihood of future conduct which the President had every right to forestall.

Further, the ruling of the Loyalty Review Board barring petitioner from public office for a period of three years was not imposed upon him in this particular case as a matter of individual adjudication. To the contrary, as in the *Garner* case, it was imposed by "a general regulation which merely provides standards of qualification and eligibility for employment" (341 U. S. at 722). At the time of petitioner's current appointment in August, 1951, Civil Service Rule V, § 5.101 (a), which had been issued in April, 1950, expressly provided that "persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104 (a) (1) through (8) * * * may, in the discretion of the Commission, be denied examination, or * * * appointment * * * for a period of not more than three years from the date of the determination of such disqualification" (15 F. R. 2239). And one "of the reasons

stated under Civil Service Rule II" was disqualification under Executive Order 9835. 5 CFR 2.104 (a) (7). Subsequently, in September, 1952, prior to petitioner's removal under the Executive Order, ineligibility for a three-year period was made mandatory, rather than discretionary, under Civil Service Commission Rule V. 17 F. R. 8565, 5 CFR (1954 Supp.) 5.101 (a). In these circumstances, the *Lovett* case, as explained by this Court in the *Garner* and *Douds* cases, plainly has no applicability here.

3. Formulating his argument somewhat differently, petitioner further argues, citing *Wieman* v. *Updegraff*, 344 U. S. 183, that arbitrary or discriminatory exclusion from public service is a violation of due process. The question there was the validity of an Oklahoma statute which required state officers and employees to take an oath that "I am not affiliated directly or indirectly * * * with any foreign political agency, party, organization or Government, or with any agency, party, organization, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; * * *" (344 U. S. at 186). As construed by the Oklahoma Supreme Court, "the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly" (*id.* at 191). This Court held that the

oath offends due process, stating that "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power" (*ibid*). In so holding, the Court once again repeated its prior statements that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work'" (*id.* at 191–192).

Like the *Lovett* case, therefore, *Wieman* v. *Updegraff, supra,* involved an extraordinary legislative enactment which barred a class of individuals from public service on grounds having no reasonable relationship to the efficiency of the public service. Nothing in the decision suggests that the legislature or the Executive lacks power to prescribe qualifications for public employment which bear a reasonable relationship to such employment, to adopt regulations for the conduct of employees, and to require dismissal of those who the Executive determines have failed to satisfy such qualifications or abide by such regulations. To the contrary, the decision expressly reaffirms the Court's prior ruling in *United Public Workers* v. *Mitchell,* 330 U. S. 75, that the Government could properly "bar its employees from certain types of political activity thought inimical to the interests of the Civil Service" (344 U. S. at 191).

In particular, it is implicit in the Court's opinion in *Wieman* v. *Updegraff, supra,* that loyalty

to the Government of the United States is a reasonable qualification for public employment. The Court cited with approval its earlier decisions in *Garner* v. *Board of Public Works, supra; Adler* v. *Board of Education,* 342 U. S. 485; and *Gerende* v. *Board of Supervisors,* 341 U. S. 56, which upheld rules of exclusion from public office based on loyalty considerations. See Part IC 2, *infra.* It distinguished those cases from the one before it on the sole ground that the Oklahoma statute contained no *scienter* requirement (*id.* at 188–191).

The vice found in the Oklahoma statute, however, is not present here. Looking to the terms of the Executive Order, it is obvious that it does not contemplate "[i]ndiscriminate classification of innocent with knowing activity" (344 U. S. at 191). As originally promulgated, the controlling standard of the Order was that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Sec. 1). And as amended by Executive Order 10241, the standard still contemplated a factual discrimination between loyalty and disloyalty—*i. e.*, whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The Order further provided (Part V) that in making this determination, the following activi-

ties of the employee were to be considered—all of which plainly involve *scienter:*

> *a.* Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> *b.* Treason or sedition or advocacy thereof;
>
> *c.* Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;
>
> *d.* Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;
>
> *e.* Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

In addition, also to be taken into consideration was (Part V):

> f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of

> acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

While this provision does not explicitly use the word "knowingly", here, as in *Garner* v. *Board of Public Works, supra,* and *Gerende* v. *Board of Supervisors, supra, scienter* is implicit. On November 14, 1947, shortly before the Attorney General disseminated his list of designated organizations, the President publicly announced that "Membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." See New York Times, November 15, 1947, p. 2, col. 2–3. Again, the Attorney General emphasized, in issuing his list of organizations, that "as the President has pointed out, * * * it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual

is disloyal. That must be the guide." See Appendix to Brief for Respondents in *Bailey* v. *Richardson, supra,* pp. 137–138. Further elaborating upon this interpretation of Part V, Section 2f, of the Order, the Chairman of the Loyalty Review Board directed that consideration be given to "the character of the organization, the period, nature and duration of the association, whether the employe * * * was aware of the subversive character of the organization at the time of such association, and the nature of his activities in connection with such organization." See New York Times, December 28, 1947, p. 28, col. 2–6; see also U. S. Civil Service Commission, Memorandum No. 1, March 9, 1948. Finally, the record herein reveals that this interpretation of the Order was followed in the present case. At the hearing before the Loyalty Review Board panel, the panel inquired into petitioner's motives for signing the various petitions and statements which were the subject of the charges and into the circumstances surrounding his membership in certain organizations. (R. 7, 20–21.)

In this light, it is apparent that the problem involved in *Wieman* v. *Updegraff, supra,* is not present here. Rather the Order here is comparable to the statutes which were upheld by this Court in the *Garner, Gerende,* and *Adler* cases, *supra,* as fixing reasonable qualifications for public office.

And even where it is conceded that executive discretion was erroneously exercised, this Court has held that the executive action could not be judicially revised. *Eberlein* v. *United States,* 257 U. S. 82; cf. *Ginn* v. *United States,* 110 C. Cls. 637; *Kellom* v. *United States,* 55 C. Cls. 174. In the *Eberlein* case, plaintiff was removed from office, in accordance with the procedure then in force, on the ground that he had accepted bribes and defrauded the Government. Two years later the Attorney General reinvestigated plaintiff's record and reported that in his judgment the charges were not sustained. Pursuant to a still further investigation, the President, by Executive Order, restored plaintiff to eligibility for appointment, and plaintiff was subsequently reinstated. Affirming the judgment of the Court of Claims denying recovery of the salary of the office from the date of his removal to the date of his reinstatement, this Court declared (257 U. S. at 84):

> But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts.

So here, if "the things required by law and regulations were done," respondents' actions are not, under the rule established by the above cases, subject to judicial review. In Part II of this brief, we shall show that petitioner's removal

complied with the pertinent procedural requirements, *i. e.*, the requirements of Executive Order 9835, as amended. In the portions of the brief which follow immediately, we shall demonstrate the application of these underlying principles to the particular constitutional questions raised by petitioner.

B. THE PROCEDURAL REQUIREMENTS OF THE FIFTH AMENDMENT ARE INAPPLICABLE TO THE REMOVAL OF GOVERNMENT EMPLOYEES

1. As in *Galvan* v. *Press, supra,* petitioner's contentions here with respect to the applicability of the Fifth Amendment must be assessed in the light of history. If, as petitioner contends, dismissal from federal service is governed by the procedural requirements of that Amendment, the Constitution has been misinterpreted by the three branches of our Government since the founding of the Republic. Never in our history has a Government employee been granted a judicial trial or a quasi-judicial administrative hearing upon his dismissal from office.

Prior to the innovation of a classified Civil Service, practically all officers and employees were appointed and removed, advanced and demoted on the basis of their political opinions and affiliations. The power to dispense public offices was deemed a perquisite of success at the polls. See United States Civil Service Commission, *History of the Federal Civil Service* (1941); Sageser,

The First Two Decades of the Pendleton Act: A Study of Civil Service Reform (1935); Foulke, *Fighting the Spoilsmen* (1919); Fish, *The Civil Service and The Patronage* (1905). The abuses inherent in the periodic wholesale summary dismissal of incumbent employees for political reasons led to the enactment of the Civil Service Act of 1883. Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 632 *et seq.* But the only limitation placed upon the power to remove summarily was the prohibition of removal for failure to contribute to any political fund or to render any political service. 5 U. S. C. 633. To further the policy of that Act, however, President McKinley issued an Executive Order in 1897 prohibiting summary dismissals from positions subject to competitive examinations. Under the authority vested in him by R. S. 1753, he ordered that no removal should be made "except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense." Executive Order 101, July 27, 1897, Eighteenth Annual Report of the United States Civil Service Commission (1902) p. 282. Despite the Presidential Order, removals for political reasons appear to have continued. Since the Order was not issued to implement any statute restricting the executive

power of removal, it was held not to be judicially enforceable.[14]

Accordingly, in 1912, proponents of the merit system obtained the passage of the Lloyd-LaFollette Act which enacted into positive law the provisions of the earlier Order. Employees were given the right to be notified of the charges and to "be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; * * *." But although sponsored and enacted by advocates of a classified Civil Service, the Act expressly denied the right to a hearing. It provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; * * *." 37 Stat. 555. Further Congressional recognition that the removal of public personnel is a discretionary executive function was again evidenced in the Administrative Procedure Act of 1946, which specifically excluded from its coverage "the selection or tenure of an officer or employee of the United States other than examiners." Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1004. See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 230, 260–261. More recently, in the 1948 revision of the Lloyd-LaFol-

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[14] See *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Taylor* v. *Kercheval*, 82 Fed. 497 (C. C. D. Ind.).

lette Act. Congress again provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal * * *." Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652.

This record of one hundred-and-sixty years of Government administration speaks with great force. It is a history the writing of which was shared by the judiciary. As we have already shown in Part IA, *supra*, pp. 31–41, the courts have always considered the selection and removal of Government employees to be an executive and legislative function. Repeatedly, the courts declined to interfere with the exercise of executive discretion in this field for the reason that, in the absence of constitutional or statutory provision fixing the tenure of office, all inferior officers and employees hold office at the pleasure of the appointing authority. They refused to intervene even when dismissal was grounded on charges involving serious criminal misconduct such as the acceptance of bribes (*Eberlein* v. *United States, supra*), violation of the Prohibition laws (*Croghan* v. *United States, supra,* and *Dupre* v. *United States, supra*), theft of Government documents (*Kent* v. *United States, supra*), and repeated attempts at seduction by force (*Golding* v. *United States, supra*).

In this light, it cannot be seriously contended that the procedural requirements of the Fifth

Amendment are generally applicable to federal employ, and petitioner so concedes (Pet. Br. 10, 14). The unbroken course of our national history is to the contrary. To disregard that history is to hold that all the decisions to which we have adverted were erroneously decided, that the Lloyd-LaFollette Act, which is regarded as a landmark in civil service reform and which has been in uncontested effect since 1912, is invalid, and that the Administrative Procedure Act, which "created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights" (*United States* v. *Morton Salt Co.*, 338 U. S. 632, 644) is constitutionally defective.

2. Petitioner argues, however, that this case is different in that he has been "branded" as disloyal and barred from Government employment for a period of three years. Such action, it is said, constitutes punishment of a severe type which cannot be imposed without compliance with the Fifth Amendment for the reason that, absent such compliance, disqualification from Government service constitutes a Bill of Attainder (Pet. Br. 18).

The keystone of petitioner's position, therefore, is this Court's decision in *United States* v. *Lovett*, 328 U. S. 303; see also *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. In the *Lovett* case, the question for decision was the con-

stitutionality of Section 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, which provided that after November 15, 1943, no salary or compensation should be paid Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett (except for services as jurors or members of the armed forces) out of any monies then or thereafter appropriated unless they were prior to November 15, 1943, again appointed by the President with the advice and consent of the Senate. Construing the Act as imposing a "permanent proscription from any opportunity to serve" (328 U. S., at 316), this Court held it invalid as a Bill of Attainder.

The *Lovett* case thus involved a highly extraordinary legislative enactment, which named three particular individuals and imposed on them a permanent disability which could be removed only by Congress. The decision invalidating such a statute cannot be construed as overruling *sub silentio* the multitude of cases sustaining the executive power to dismiss employees without a hearing for inefficiency, misconduct, violation of law or regulations, or, indeed, for no assigned cause whatever. Nor can it be construed as depriving either Congress or the Executive of the power to prescribe qualifications for federal employment, to adopt regulations for the conduct of federal employees, and to require dismissal of those whom the Executive determines have failed

to satisfy such qualifications or abide by such regulations. Indeed, at the very next term this Court, in *United Public Workers* v. *Mitchell*, 330 U. S. 75, sustained provisions of the Hatch Act which required that federal employees abstain from certain political activities, and imposed "a penalty of dismissal from employment" (330 U. S. at 79) for violation. In so doing it made no suggestion that determination of the fact of violation was not a purely administrative matter to be made according to any procedure which the Executive deemed appropriate, or that such a determination was entitled to any form of judicial review.[15]

The limited scope of the *Lovett*, *Cummings* and *Garland* cases was made plain by this Court in *American Communications Assn.* v. *Douds*, 339 U. S. 382, at pp. 413–4:

> Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: in the previous decisions the individuals involved were in

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[15] The applicable rules of the Civil Service Commission provided merely for determination of the fact of violation by the Commission "after due notice and opportunity for explanation" Civil Service Rule 15 (set out in the Appendix to the Government's brief in Mitchell). This Court pointed out that "The act provides no administrative or statutory review for the order of the Civil Service Commission" (330 U. S. at 93). See also *Blackmar* v. *Guerre*, 342 U. S. 512, 515.

formants wherever possible.[17] Nevertheless, the necessity that certain types of information be kept confidential is inherent in the nature of the program and of the threats to our national

[17] U. S. Civil Service Commission Memorandum No. 41, April 20, 1949, revised April 17, 1950, instructed all Boards that "all reasonable efforts should be made to induce all identified non-confidential witnesses who have given pertinent information adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross-examination." The Boards were advised that, "if any such witness declines or fails to appear as a witness after thus being invited by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere." See also Memorandum No. 41, Second Revision, February 28, 1951; Memorandum No. 41, Third Revision, February 19, 1952; Memorandum No. 41, Third Revision, Supplement No. 1, April 15, 1953, which provided instructions for inviting informants, who were not willing to testify in the presence of the employee and his counsel, to give their testimony to the Boards without the presence of the employee and his counsel.

Mention should also be made of the solution sought by the Loyalty Review Board of the problem of substantiating charges that an employee has improperly associated with certain individuals asserted to be Communists and charges against an employee of being a member of a Communist organization, which depend upon the unamplified report of an informant. In U. S. Civil Service Memorandum No. 30, Second Revision, January 23, 1950, the Loyalty Review Board stated its opinion that "a charge of association with alleged Communists should not be made unless the applicable Board has been first furnished with sufficient factual information, both with respect to the claimed association, and the allegation that the persons with whom the employee is charged with association, are, in fact, Communists, so that

security which it was intended to combat.[18] We recognize, of course, that the necessity for non-disclosure of confidential information in the interests of national security may also arise in a criminal prosecution, such as treason or espionage, and that the Government must choose between disclosure and non-prosecution, that it cannot use the evidence of any informant in a criminal case unless his testimony is presented in open court. We submit, however, that, weighing the

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the Board may intelligently reach a fair conclusion thereon as to the ultimate fact asserted in the record. It is the understanding of the Loyalty Review Board that the FBI report will name such alleged Communists and set forth in the report such identifying facts as, in the opinion of the FBI, security reasons will permit, and in the absence of such facts will authenticate the status of such alleged Communist associates by suitable FBI evaluation of the confidential source of the information, and that with respect to the facts involved in the status of the employee being investigated, the FBI will, in its report, furnish to the Loyalty Boards such relevant surrounding data as the FBI shall conclude its security reasons permit, and will include in such report such evaluation of the factual source as to the FBI shall seem proper." See also Memorandum No. 10, Revised, January 23, 1950.

[18] The measures taken by the British Government with respect to disloyalty in the public service have been described as follows (Bontecou, *The Federal Loyalty-Security Program* (1953), c. VIII, pp. 265–267):

"The actual interview with the civil servant has none of the procedural formalities or safeguards of an administrative hearing. It usually lasts from one-half to three hours, although the accused may be called back later. *No effort is made to inform him of the evidence in the record; on the contrary, great stress is laid upon the concealment of that*

conflicting interests involved, the Government should not be put to such a choice in the field of personnel administration. Cf. *United States* v. *Reynolds*, 345 U. S. 1; *United States* v. *Nugent*, 346 U. S. 1.

Similar considerations apply with respect to judicial review of the executive determination of loss of confidence in the loyalty of an employee.

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evidence lest knowledge of it may lead to disclosure of sources of information. The questions put by the advisors may relate to matters concerning which they are already fully informed, or may range over areas not covered by the records before them. Inevitably such an interview must take on, to some extent, the character of a battle of wits. Regardless of these difficulties, the advisors must make not only the relatively simple conclusion of fact as to present membership in the Communist Party or some other subversive organization, but the far more difficult and subjective judgment as to the present trustworthiness of the man whose direct connections with the Party are in the past. This judgment, when made after full discussion of the case by all the advisors, is incorporated in a report to the minister which may analyze the evidence and set forth fully the reasons for the conclusion.

* * * * *

"*In the framing of allegations, more attention has been given to the requirement that the source of information be concealed than to the Prime Minister's statement that the civil servant 'should be given chapter and verse' in support of the charge against him.* In seventeen out of twenty-six cases, the accused was told nothing more than that he was either believed to be a member of the Communist Party, or that he was associated with it or the Fascist Party in such a way as to raise legitimate doubts as to his reliability. In five cases he was given, in addition, the name of the branch to which he was alleged to have belonged. In one of these five, continued activity on behalf of the Party was also

Thus, it is not in the best interests of an efficient Civil Service that an employee be dismissed on charges of bribery or theft if, in fact, he is not guilty. As we have pointed out, it has been held inappropriate for courts to review such matters of internal administration, notwithstanding that courts are accustomed to make comparable determinations in dealing with criminal cases. Loyalty in the government service presents an *a fortiori* situation. Determinations as to whether

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alleged, and in another it is reported that the questioning by the Advisory Body revealed that an allegation had been made that the individual was the secretary of his branch. In the remaining three, additional allegations were made as follows:

1. You have taken part in the activities of the Party since the end of the war.

2. Before the 1939–45 War [you] regularly attended and spoke at Communist meetings.

3. You took an active part between 1941 and 1943 in the activities of the Party in various places in * * * You became educational organizer for the Party in * * * District. You also used an alias for your Party work.

Protests against these practices have been to very little avail.

* * * * *

"It is evident that in this procedure none of the traditional safeguards, which we sum up in the phrase 'due process,' are present. *The Government has taken the position that where evidence and sources of information cannot be made known, the protection afforded by a voluntary adoption of forms of judicial procedure would prove illusory.* Neither is the civil servant protected by any statutory provisions. Control of the Civil Service in England is a function of the 'prerogative,' and matters of prerogative are not the subject of legislation. Moreover, they are beyond the jurisdiction of the courts." [Emphasis added.]

loyalty is certain, at times based on confidential information, are remote from the normal judicial sphere. As this Court said of an analogous problem in *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

Moreover, it must be recognized that it is in the public interest that only those whose loyalty is beyond suspicion be employed by the Government. In the present state of the world, it cannot be said that executive alarm "about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense. * * * Certainly no responsible American would say that there were then or are now no possible grounds on which [the Executive] might believe that Communists in our midst are inimical to our security." *Harisiades* v. *Shaughnessy*, 342 U. S. at 590. Since "disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify" (*Wieman* v. *Updegraff*,

supra, at 188), dismissal from Government service could properly be based not on proven fact but on suspicion.[19] But, as the Lord Chancellor of England has said in a similar context, "it seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy." *Rex* v. *Halliday* (*Ex parte Zadig*), [1917] A. C. 260, 269; cf. *Rex* v. *Home Secretary* (*Ex parte Lees*), [1941] 1 K. B. 72; *Greene* v. *Home Secretary*, [1942] A. C. 284; *Liversidge* v. *Anderson*, [1942] A. C. 206; *Rex* v. *Home Secretary* (*Ex parte Budd*), [1942] 2 K. B. 14. "The very nature of the President's power to order the removal of [Government employees] rejects the notion that courts may pass judgment upon the exercise of his discretion." *Ludecke* v. *Watkins*, 335 U. S. 160, 164; cf. *United States* v. *Reynolds*, 345 U. S. 1.

We conclude, therefore, as did the court below in the *Bailey* case, *supra*, that "Upon the contention that suspicion of disloyalty has characteris-

[19] In fact, far more than suspicion is required: the Executive Orders contemplate careful investigation, opportunity to the employee to testify, and dismissal only if, on all the evidence, "there is a *reasonable* doubt as to the loyalty of the person involved to the Government of the United States." [Emphasis added.]

tics distinguishing it from suspicion of other offenses, * * * the differences tend to solidify rather than to weaken the application of the doctrine that the President and the Congress are responsible for the qualifications, ability, judgment and loyalty of Government employees and that removal from Government employment is within their discretion." (182 F. 2d at 65.)

C. PETITIONER'S DISMISSAL UNDER EXECUTIVE ORDER 9835, AS AMENDED, DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner's complaint also attacks the loyalty program and respondents' actions thereunder with respect to him as an abridgment of the right of freedom of speech and opinion guaranteed by the First Amendment (R. 13). Petitioner, however, does not brief this point. Accordingly, we do not know the contentions underlying this claim of unconstitutionality. In this posture, we shall deal herein with what appears to us to be the principal arguments suggested in the dissenting opinion in the *Bailey* case, *supra*, and other public discussions of the loyalty program.

1. In this area also, petitioner's challenge to the validity of the Executive Order cannot be divorced from the historical setting. Executive and legislative concern with the problem of loyalty in the Federal Government is not new. Thus we are told that President Washington wished appointments to go only to those who were "sound supporters of the new system." Fish, The Civil

4. (a) Petitioner urges, however, that the scope of the decision in *Wieman* v. *Updegraff, supra,* goes beyond the issue of the reasonableness of the qualifications fixed for Government service. Petitioner insists that the Due Process Clause is equally applicable to the procedure followed in determining whether an employee meets the qualifications. We submit that the decision cannot be so construed. Since this contention was not before the Court, the decision cannot be read as overruling *sub silentio* the countless cases sustaining the executive power to dismiss employees without a hearing or as ruling *sub silentio* that the Lloyd-LaFollette and Administrative Procedure Acts are invalid.

Further, insofar as petitioner has been injured by the stigma to his reputation, we see no basis for holding that that stigma is a thing apart, which gives rise to constitutional rights not applicable to other dismissals from the Government service. The difference in harm resulting from a dismissal on loyalty grounds and a dismissal for offenses of serious moral turpitude is a difference in degree, not in kind. It might be equally difficult for one dismissed because of the acceptance of bribes, theft, sex offenses, or even incompetence, to obtain suitable employment elsewhere. Yet, as we have noted *supra,* pp. 31–41, 44, such employees are neither entitled to a quasi-judicial hearing or to judicial review of the merits of their dismissals.

Service and the Patronage (1905) 9.[20] During President Lincoln's administration a policy of dismissing all employees deemed disloyal appears to have been pursued as a matter of course.[21] President Wilson was similarly faced with the problem of disloyalty during World War I. On April 17, 1917, he issued a confidential Executive Order providing that:

> The head of a department or independent office may forthwith remove any em-

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[20] In a letter of September 27, 1795, to the Acting Secretary of State, Washington stated, "I shall not, whilst I have the honor to Administer the government, bring a man into any office, of consequence knowingly whose political tenets are adverse to the measures which the *general* government are pursuing; for this, in my opinion, would be a sort of political Suicide." Washington, *Writings* (Fitzpatrick Ed.) Vol. 34, p. 315.

[21] Detailed evidence of the extent t which such a policy of dismissal was followed is not readily available since it does not appear that the policy was ever formalized in terms of presidential instructions or regulations. The practice is, however, indicated with sufficient clarity by the following:

The Annual Report of the Postmaster General for 1861 (S. Doc. No. 1, 37th Cong., 2d Sess., Vol. 3, p. 582) states: "By the existing laws all postmasters and mail-carriers, and all other persons engaged in handling the mails of the United States, or in clerical service, were required to take the usual oath of allegiance to this government, as well as for the faithful performance of their duties. Whenever it was made apparent by their declarations, or by their conduct, that there was a practical repudiation of the obligation of this oath, whether the party was a postmaster or a postal contractor, I ordered a removal from office in the one case and the deprivation of contract in the other. * * *"

Similar evidence appears in the *Report on the Civil Service of the United States*, H. Rep. No. 17, 49th Cong., 2d Sess.

Granted that the stain of a dismissal on loyalty grounds is a deep one which "has become a badge of infamy" (*Wieman* v. *Updegraff, supra,* at 191), this fact neither invalidates petitioner's dismissal without a quasi-judicial hearing nor gives him a right to redress. If, as we have shown, the power of the Congress and the Executive to provide for the removal of federal employees is unrestricted, the damage suffered by an individual as the result of official action within the scope of that authority is *damnum absque injuria.* Cf. *Spalding* v. *Vilas,* 161 U. S. 483; *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 687, n. 7; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590–591; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949; *Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Dodez* v. *Weygandt,* 173 F. 2d 965 (C. A. 6); *Gibson* v. *Reynolds,* 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925.

Recent decisions of this Court in other fields reinforce this conclusion. Cf. *United States* v. *Nugent,* 346 U. S. 1; *Shaughnessy* v. *Mezei,* 345 U. S. 206; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537. Those cases also involved due process attacks upon action taken pursuant to a plenary power of Congress and the Executive. *Mezei* and *Knauff* involved the power to exclude aliens; *Nugent* involved the power of conscription. In those cases, as in the present one, the clash between public and individual in-

terests was colored by the fundamental nature of the individual interests invaded, *i. e.*, separation from family, friends, home and business. The Court nevertheless held that such hardship could validly be inflicted without a hearing. Of particular importance here, the Court further held that, in view of the plenary character of the power in question, executive action could validly be based on confidential information. The plenary power of the Executive and the Congress over the tenure of federal employees is no less firmly imbedded in the "tissues of our body politic" (*Galvan* v. *Press, supra,* at 531).

(b) Petitioner's approach to the problem of due process in loyalty cases consists of a central assertion that "where a system is created of discharge and exclusion from government service on the basis of an adverse finding against the employee on the issue of his loyalty arrived at by a proceeding which has the appearance of a trial on the merits, the finding which is the basis of governmental action may not be arbitrarily made. It must be made by a hearing which is in fact a hearing with full opportunity to 'test, explain and refute.'" (Pet. 15.) The core of his contention appears to be an assumption, not justified, that this Court, in the *Wieman* case, has already found that due process in the area of loyalty dismissals can only be met by the equivalent of an adversary trial on the merits.

If it be assumed, *arguendo*, that the *Wieman* case must be read as holding that dismissals on loyalty grounds are subject to the requirements of procedural due process,[16] it is crucial to remember that due process is a variable concept, to be measured in the light of all surrounding circumstances. Here, the measuring circumstances consist of the balance to be struck between the protection of the individual and the demands of national security.

Analyzing petitioner's basic position precisely, he objects that he was given no opportunity for confrontation and cross-examination of confidential informants. Petitioner argues that, for this reason, the procedure which resulted

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[16] In so assuming, we do not mean to suggest further that *Wieman* v. *Updegraff*, *supra*, can be read as extending the protection of the Due Process Clause to dismissals on other than loyalty grounds as well. It should be noted that petitioner joins us in this limited reading of the case. Petitioner concedes that where loyalty is not involved no constitutional issues are raised (Pet. Br. 10, 14–15, 19–20). But even if *Wieman* v. *Updegraff*, *supra*, could be given this broader interpretation, we think it clear that the Due Process Clause does not require a quasi-judicial hearing in the ordinary employee dismissal case. As we point out above, due process is not a technical conception with a fixed content unrelated to time, place and circumstances. For the reasons stated in Part IA of this brief, *supra*, pp. 31–41 (see also pp. 41–44, *supra*), we submit that weighing the individual's interest against the infinite variety and complexity of the tasks of government administration, due process does not compel modification of the extent of discretion traditionally vested in the Executive branch in this area.

in his discharge was "patently arbitrary or discriminatory" within the meaning of *Wieman* v. *Updegraff*, 344 U. S. at 192 (Pet. Br. 20). Admittedly, the absence of confrontation and cross-examination may, in some circumstances, be "patently" arbitrary. It does not follow, however, that what is "patently" arbitrary in some circumstances is also "patently" arbitrary in other circumstances within the meaning of due process of law.

As Mr. Justice Holmes cogently observed in *Moyer* v. *Peabody*, 212 U. S. 78, 84, "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." Cf. *Wolf* v. *Colorado*, 338 U. S. 25, 27; *Federal Communications Comm'n* v. *WJR*, 337 U. S. 265, 275. To quote a recent summary of the Court's decisions in this area (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163, *Frankfurter*, J., concurring):

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
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> * * * * *
>
> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing

> it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Applying these considerations to the immediate situation, it seems to us that insofar as dismissal for disloyalty has peculiarities which distinguish it from dismissal for bribery, theft and other offenses, they are adverse to petitioner's conclusion. In essence, the problem is one of "balancing the conflicting individual and national interests involved." *American Communications Ass'n* v. *Douds,* 339 U. S. 382, 410.

From the point of view of the security of the nation, the retention in the Government service of one suspected of theft or a similar offense would not be of great importance, and the revelation of the method of detection and the names of witnesses would probably not affect the public interest. But disloyalty in the Government service under present circumstances is a matter of great public concern. And it was the informed judgment of the President and those charged by him with administering the loyalty program that in many instances disclosure of the identity of informants, of investigative techniques, and of sources of information, would be strongly against the public interest.

As explained by the former chairman of the Loyalty Review Board (Richardson, *The Federal Employee Loyalty Program,* 51 Col. L. Rev. 546, 549–550):

> * * * the role of the FBI report must be appreciated. In the overwhelming majority of cases, the record, without the FBI report, would not contain important material information with respect to derogatory items concerning the particular employee. The long and varied experience of the FBI is to the effect that its investigative reports should include statements from confidential sources. Of necessity, these sources are of varied natures. The FBI has many agents operating secretly for the purpose of ferreting out facts to aid the President. The disclosure of their identity, of circumstances indicative of identity, would not only completely destroy their usefulness but in many cases subject *them to serious physical danger.* Other confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the

FBI. Numerous comparable informants might be referred to, and in the overwhelming majority of cases, the material facts with reference to derogatory items come from such confidential sources.

As a result, the FBI rigorously observes its promises of confidence and will not disclose to anyone these evidential sources. Unless the Board in question is permitted to take cognizance of such material on these terms, it will be unable to consider such material at all. But the full scope of the FBI report must be available to the Board, or the whole system becomes insufficient. It is not an answer to suggest that the confidential reports made by the FBI should be used only as a lead to actual first-hand evidence. The very nature of such confidential information implies that, since the persons would speak to the FBI only in confidence, personal testimony could not be secured even if the Board had the power to require it.

See also Hoover, *A Comment On the Article "Loyalty Among Government Employees,"* 58 Yale L. J. 401, 409-410; New York Times, Dec. 28, 1947, p. 28, col. 2-6 (Statement of Seth Richardson). Recognizing the burden placed upon the employee by the non-disclosure of confidential information, the Loyalty Review Board endeavored to secure the testimony, and permit confrontation and cross-examination, of in-

> ployee when he has ground for believing that the retention of such employee would be inimical to the public welfare by reason of his conduct, sympathies or utterances, or because of other reasons growing out of the war. Such removal may be made without other formality than that the reasons shall be made a matter of confidential record, subject, however, to inspection by the Civil Service Commission.[22]

Again, during World War II, procedures were

(1868). The Jenckes Committee had sent interrogatories to numerous public officers which included questions with respect to political considerations affecting appointments and removals from office. Only two of the answers relating to these questions are set out in the Report. The Commissioner of Customs stated, "I never inquired about the politics of anyone, except during the war, and then only to satisfy myself that he was loyal" (p. 20). The Superintendent of the Assay Office, New York City, stated that in making appointments "Good character, capacity, and, in the light of recent events, *loyalty*, are *sine quo non*" and further stated that "during the war two of our workmen were removed for carrying their partisanship to the point of practical disloyalty" (p. 23).

That like policies were followed by others in President Lincoln's administration is indicated by the statement that Secretary of War Stanton, on the day of his confirmation, "consulted with the 'committee on loyalty of Federal Employees' in order to learn who in his Department * * * could be trusted and who must be arrested or dismissed." F. A. Flower, *Edwin McMasters Stanton* (1905), p. 119. The Committee referred to was evidently a select committee of the House of Representatives appointed pursuant to resolution of Mr. Potter, adopted July 9, 1861, 56 Cong. Globe 26.

[22] The entire text of the Order and of certain accompanying correspondence is set out in Corwin, *The President* (1948), pp. 433–4, n. 100.

adopted for the screening of disloyal applicants for employment and the dismissal of employees deemed disloyal. In 1939 Congress enacted in Section 9A of the Hatch Act a prohibition of the employment by the Government of any person who is a member of "any political party or organization which advocates the overthrow of our constitutional form of government." 53 Stat. 1148, 5 U. S. C. 118j. In June 1940, Congress further provided in a rider to the Emergency Relief Appropriation Act of 1941, that "no alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution." Section 15 (f) of the Act of June 26, 1940, 54 Stat. 611, 620.[23] And in 1941, Congress initiated the practice of embodying riders in appropriation acts barring the use of any of the funds appropriated for the payment of compensation to "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government by force or violence." 55 Stat. 42, 55, 75, 123, 131, 176, 197, 235, 303, 351, 394, 403, 446, 465, 497, 540, 576, 755, 837.[24] Meanwhile, in June and July 1940, the Lloyd-LaFollette Act (37 Stat. 555, 5 U. S. C.

[23] See also Act of July 1, 1941, 55 Stat. 396, 402, Act of July 2, 1942, 56 Stat. 634, 640.

[24] More recent evidence of this practice is found in 67 Stat. 17, 60, 72, 194, 201, 224, 259, 277, 293, 316, 335, 353, 385, 436, 481.

652) was amended to give the War and Navy Departments and the Coast Guard the authority to remove summarily any employee in the interests of national security. Acts of June 28, 1940 and July 2, 1940, 54 Stat. 679, 713, 50 U. S. C. App. (1946 Ed.) 1156.

To carry out these mandates of Congress, the Civil Service Commission on June 20, 1940, issued Department Circular No. 222, in which it stated that the Commission "will not certify to any department or agency, the name of any person when it has been established that he is a member of the Communist party, the German Bund, or any other Communist, Nazi, or Fascist organization." On March 16, 1942, the Civil Service Commission pursuant to the authority delegated to it by Executive Orders 9063 (7 F. R. 1075) and 9067 (7 F. R. 1407), adopted War Service Regulation II Section 3 (7 F. R. 7723), which provided that an applicant may be denied appointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." [25]

As to incumbent employees, the Civil Service Commission's Circular of June 20, 1940, after referring to the statutory provisions mentioned above, stated "In view of the exigencies of the times, the Commission believes that Government

[25] The validity of this Regulation was unsuccessfully challenged in *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied 331 U. S. 865.

agencies may freely take these matters into consideration in determining whether the removal of a particular employee will 'promote the efficiency of the service' ". Thereafter the Office of the President issued a directive calling for F. B. I. investigations of the loyalty of incumbent employees on request from the interested Government agency.[26] In June 1941, Congress appropriated $100,000 for an investigation of Government employees "who are members of subversive organizations or advocate the overthrow of the Federal Government" and directed the F. B. I. to report its findings to Congress. Act of June 28, 1941, 55 Stat. 265, 292.[27] The report made to Congress pursuant to this direction[28] clearly sets forth the practices thereupon adopted in connection with loyalty investigations of incumbent employees.

The F. B. I. was authorized to institute such investigations on its own initiative and to transmit the report of the investigation to the interested agency for its determination as to what action was appropriate.[29] Inasmuch as the congressional mandate provided for the investigation of members of "subversive" organizations, it was

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[26] Set out in H. Doc. No. 833, 77th Cong., 2d Sess., pp. 6–7.

[27] See also Act of July 2, 1942, 56 Stat. 468, 482, appropriating $200,000.

[28] H. Doc. No. 833, 77th Cong., 2d Sess.

[29] *Ibid.*, pp. 9–10.

necessary to determine which organizations should be so considered. In June 1941, the Attorney General advised the F. B. I. that the Communist Party was an organization within the congressional intent and that other organizations having Communist backgrounds or affiliations were intended to be included. The F. B. I. was requested to furnish information as to such organizations. Thereafter the German-American Bund, and seven other groups, were also designated as coming within the congressional mandate.[30] In April 1942, the Attorney General established an Interdepartmental Committee to advise the various employing agencies in the use of F. B. I. reports.[31] This Committee designated some thirty-two additional organizations which were to be considered in the investigation of charges against employees. The last-mentioned organizations were neither rated as "subversive" or "non-subversive" under the law. While membership or participation in their activities did not require dismissal under the law, it was concluded that such affiliations were clearly relevant to a broad inquiry as to fitness for public employment.[32]

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[30] *Ibid.*, p. 19.

[31] The Committee comprised officials representing the Interior Department, Treasury Department, Commerce Department, Justice Department, and the Federal Deposit Insurance Corporation. *Ibid.*, p. 24.

[32] *Ibid.*, pp. 2, 12, 19–20, 27.

On February 5, 1943, President Roosevelt issued Executive Order 9300 (8 F. R. 1701) replacing the Attorney General's Interdepartmental Committee with a new "Interdepartmental Committee" on employee investigations.[33] Pursuant to this Order the names of some 47 organizations characterized as subversive were disseminated among government agencies for use in connection with consideration of employee loyalty. 5 CFR 210.15, Appendix A., pp. 200–201. This Order remained in effect until it was revoked and superseded by Executive Order 9835.

Thus, it is apparent that measures to insure the loyalty of federal employees have been adopted in every major crisis which this nation has had to face. So far as appears, those measures were applied without distinction based on the responsibility of the position held or "sensitiveness" of the agencies affected. They were, moreover, often applied without regularized procedure, without opportunity for even a limited hearing, and with little or no attempt to prescribe standards for determination of disloyalty. Accordingly, the thrust of petitioner's argument is that a kind of action which has been taken by the

[33] This Committee comprised officials representing the Treasury Department, Interior Department, Federal Reserve Board, Federal Deposit Insurance Corporation, and the Civil Service Commission. Report of the President's Temporary Commission on Employee Loyalty (1947), p. 6, n. 5.

executive in every major crisis presenting problems of loyalty was in each case unconstitutional.

Petitioner's argument goes further than that, however, for in asserting that political opinions, associations and activities may not constitutionally be considered as a basis for appointment or removal from office, he is in effect asserting that the practice followed by almost every President from Jefferson to Cleveland was unconstitutional. It is notorious that during that era in our history, political affiliations were regarded as almost the primary consideration in making appointments, and removals for political grounds were commonplace. See generally, Fish, *The Civil Service and the Patronage* (1905); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* (1941). The prevailing practice was that "to the victor belong the spoils," a practice which was authoritatively described as meaning that "the entire force of the civil service of the United States may be changed for mere political opinion." H. Rep. No. 47, 40th Cong., 2d Sess., p. 5.[34] While this "indiscriminate removal of public officers for a mere difference of political opinion" (Democratic Party Platform of 1832, quoted in Civil Service Commission, *History of the Federal Civil Service, supra,* p. 21) was often roundly condemned, it was never thought to present any constitutional question

[34] For a contemporary description see T. H. Benton, *Thirty Years' View* (1865), pp. 159–163.

or other occasion for judicial relief. On the contrary, it is in the context of this prevailing practice that the cases cited in Point IA of this brief were decided.[35] In the light of this history and these authorities, the First Amendment cannot be regarded as placing any limitation on the executive power of removal from Government office.

2. Assuming, however, that exclusion from federal service pursuant to a statute or regulation of general applicability gives rise to issues different from those raised by exclusion pursuant to a less formalized exercise of executive discretion, we think it clear, under principles recently reiterated by this court, that Executive Order 9835, as amended, was subject to no constitutional infirmity under the First Amendment. *Adler* v. *Board of Education,* 342 U. S. 485; *Garner* v. *Board of Public Works,* 341 U. S. 716; *Gerende* v. *Board of Supervisors,* 341 U. S. 56; *United Public Workers* v. *Mitchell,* 330 U. S. 75; cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382.

In *Public Workers,* the Court upheld a legislative prohibition of political activity by federal employees. In so doing, it recognized that the prohibition interfered "with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments" (330

[35] For cases refusing to consider allegations that dismissals were for purely political reasons, see note, 14 *supra.*

U. S. at 95). But it held that since Congress could reasonably conclude that such legislation was necessary to forestall actions of employees which "menace the integrity and the competency of the service" (*Id.* at 103), it lay within Congressional power. The Court stated the guiding principles in these terms (*Id.* at 101, 102):

> * * * For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. * * *
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> * * * The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power.

While *Public Workers* did not involve the precise question here presented, it is apparent that the principles there laid down are equally applicable to those political activities of employees which relate to loyalty. Disloyalty to the United States is a far greater menace to the integrity and competence of the service than mere partisan political activity. It is not surprising, therefore, that the principles formulated in *Public Workers* were followed by this Court in *Gardner, Adler,* and *Gerende* in sustaining State leg-

islation aimed at safeguarding the public service from disloyalty.

The question in *Garner* was the validity of an amendment to a city Charter which barred from the city's public service persons who, subsequent to its adoption, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. Holding the amendment constitutional, the Court stated (341 U. S. at 720–721):

> * * * The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102–103 (1947), and a State is not without power to do as much.

Faced with a similar question in *Adler*, the Court expressed itself in even more forceful language (342 U. S. at 492):

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communi-*

> *cations Assn.* v. *Douds*, 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Of particular importance here, these cases reject the contention that beliefs and associations may not properly be considered in determining eligibility for public employment. As the Court had pointed out in *American Communications Assn.* v. *Douds, supra,* at 391:

> * * * The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of births and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

In a comparable vein, the Court stated in *Garner*, addressing itself to the validity of an affidavit requiring disclosure of past or present membership in the Communist Party, that (341 U. S. at 720):

> * * * a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid.

Similarly, the Court declared in *Adler* that (342 U. S. at 493):

> * * * One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

These decisions, we submit, control the disposition of the present case. If States and Municipalities may establish an employment qualification of loyalty as a reasonable regulation to protect the public service, certainly, the Federal Government "is not without power to do as much." *Garner* v. *Board of Public Works, supra,* at 721.

Executive Order 9835, as amended, was not a prohibition of advocacy or expression of views. It did not declare illegal any organization, or prohibit any of its activities. It was aimed at conduct—at the danger that certain types of persons, if allowed to remain in the Government service, might betray the trust reposed in them by the commission of acts injurious to the national security. The Order was promulgated because the President concluded, on the basis of extensive investigations and studies by both the Executive and Legislative branches, of the experience of other nations, and of facts peculiarly within his knowledge concerning our international relations that the existence of the world-wide totalitarian movements of Communism and Fascism raised substantial dangers of serious evils to be expected from the presence within the federal service of adherents of those movements.[36] Because of the peculiar opportunities afforded Government em-

[36] The results of some of these studies were set forth at pages 24–55 of Respondents' Brief in *Bailey* v. *Richardson, supra.*

ployees for espionage and other conduct destructive of the most vital interests of the nation, he established the standard that those persons as to whom there is a reasonable doubt of loyalty to the United States be denied federal employment. In so doing, he adopted a regulation which clearly comes within the "generally existing conception of governmental power" (*United Public Workers* v. *Mitchell, supra* at 102), for like measures have been adopted by the Federal Government in every period of comparable crisis and have been adopted by State and Municipal Governments to meet the present crisis. That others may differ with the President as to the necessity or wisdom of such a course is immaterial. The judicial inquiry is limited to the question whether there was a reasonable basis for the executive judgment. And, in the light of this Court's recent opinions setting forth the substantial dangers to the national security posed by the communist conspiracy,[37] there is no room for doubt that the executive judgment was reasonable. The words of this Court in the *Mitchell* case (with one appropriate substitution) are completely apposite here: "To declare that the present supposed evils * * * are beyond the power of [the President] to redress would leave the

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[37] See *e. g., Dennis* v. *United States*, 341 U. S. 494; *Galvan* v. *Press*, 347 U. S. 522; *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

nation impotent to deal with what many sincere men believe is a material threat to the democratic system" (330 U. S. at 99).

3. Petitioner makes much of the fact that his position was non-sensitive, implying that the danger feared was remote and hypothetical (Pet. Br. 3, 11). The identical contention was made with at least equal force in *Public Workers* and was rejected by the Court. Just as in that case, Congress could rationally conclude that political activity of any government employee, however menial, would interfere with the efficiency of the federal service, so here the President could rationally conclude that no activity of the Government was so unimportant that it could be entrusted to persons deemed disloyal to the United States.

Further, the question here is not whether there was a clear and present danger that petitioner's continued employment would result in the subversion of our form of Government but whether there was a reasonable basis for the executive judgment underlying the loyalty program. As this Court declared in *Douds,* "the attempt to apply the term, 'clear and present danger' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea" (339 U. S. at 394). Cf. *Dennis* v. *United States,* 341 U. S. 494, 507–508. "When the effect of a statute or ordinance upon the exercise of First

Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity" (*American Communications Assn.* v. *Douds, supra* at 397). Thus, in explaining the basis for its decision in *Public Workers,* which did not utilize the "clear and present danger" formula, the Court explained in *Douds* that "the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgment of First Amendment rights, and the large public interest in the efficiency of government service, which Congress has found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment" (339 U. S. at 405). And, significantly, the more recent cases in this field such as *Garner* and *Adler* make no mention of the "clear and present danger" test.

What the argument as to remoteness of the danger comes down to is an assertion that the Government is powerless to protect itself from possible espionage and fifth column activities in aid of hostile foreign powers on the part of its employees until they occur and are discovered; that it must ignore the evidence that one of the techniques by which the Communist Party seeks to establish its dictatorship is the obtaining of every possible foothold in the government service; that it must wait until the Communists and

their dupes have become too powerful to be eradicated from that service before doing anything to eradicate them. Admittedly, the vast majority of Government employees are loyal and only a small number have been dismissed for doubtful loyalty, but that is not the point. Faced with a potential enemy whose asserted aim is world domination and the destruction of all civil liberties, the Government is not required to wait until war is declared or a coup d'état has begun. Cf. *Dennis* v. *United States*, 341 U. S. 509–51[illegible]. The President, we submit, is entitled to insist that all Government servants, like Caesar's wife, be above suspicion.

4. Last, objection is made to the alleged vagueness and uncertainty of the standards of the Loyalty Order. The contention seems to be that the Order permitted a broad inquiry into beliefs of every kind, including beliefs bearing no reasonable relation to the evil at which the President aimed, and, for that reason, was defective although a more narrowly drawn Order might have been valid.

Viewed—as it must be—as a measure to prevent possible conduct, the likelihood of which was to be determined on the basis of the activities and associations of the persons involved, Executive Order 9835, as amended, presents no serious question, we submit, on this score. Since it did not prohibit expression of views, there is no question

here of defining the precise range of the expressions prohibited. Moreover, it involved no criminal sanctions, and hence does not present the question whether the strict requirements of definiteness and certainty of a criminal statute were met. Indeed, as we have seen (*supra,* pp. 48–49, 84–85), the Order was in no sense punitive.

It may be assumed that, as a practical matter, the Order may have acted as a deterrent to employees in their exercise of First Amendment rights. "But even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship * * *. The hazard of such restraint is too remote to require striking down a [regulation] which on its face is otherwise plainly within the area of [executive] power and is designed to safeguard a vital national interest." *United States* v. *Harriss,* 347 U. S. 612, 626. "Similarly, the Hatch Act probably deters some federal employees from political activity permitted by that statute, but yet was sustained because of the national interest in a nonpolitical civil service. *United Public Workers* v. *Mitchell,* 330 U. S. 75." *United States* v. *Harriss, supra* at 626, n. 17.

Further, measured by the standards traditionally applied in cases involving Government employment, the Order was certainly not deficient. As we have already shown, in the absence of legislation to the contrary, all inferior officers and

employees hold office at the pleasure of the appointing authority. To hold office at the will of a superior and to be removable therefrom only in accordance with definite standards are opposite and inherently conflicting ideas. That the President and Congress have attempted to restrict the discretion of administrative officials by laying down standards for removal does not mean that the rights thus conferred upon employees are raised to the status of Constitutional rights. And it may be noted that the standard laid down in the Lloyd-LaFollette Act, which has been in uncontested effect since 1912, is that removal shall be made only "for such cause as will promote the efficiency of the service." It has never been suggested that that standard is void for indefiniteness; yet, plainly, that legislative standard is no less broad than that specified in the Order, *i. e.*, "that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." Indeed, as we have indicated, the standard of the Executive Order is merely one example of "such cause as will promote the efficiency of the service."[38]

To require a narrower test would be to ignore the essential nature of the problem. Inter-

[38] In the light of the attacks now made on it, it is interesting to compare the careful effort made in Executive Order 9835 to prescribe standards for dismissal with the extreme generality of President Wilson's order, set out *supra*, p. 71.

national Communism is, in many of its aspects, a secret and conspiratorial movement. It operates in the United States not only directly through the Communist Party of America and those who admit membership in it, but also through numerous front organizations and through individuals who endeavor to conceal their membership in or sympathetic association with the Party. "[D]isloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify." *Wieman* v. *Updegraff*, *supra*, at 188. Hence to secure direct and conclusive proof is often difficult and always time-consuming. For purposes of criminal prosecution, it is appropriate that the tests be drawn narrowly. The Government can and should be expected in criminal proceedings to bear a heavy burden of proof. And in general, criminal prosecution must await the commission of unlawful acts; it cannot anticipate them. Like considerations may be true as to general regulations applicable to private individuals or organizations. But in dealing with the federal service, the executive is not required to wait for proof; it may properly insist that government employees be above suspicion; it can—as the Order did—base dismissals upon "reasonable doubt" rather than incontrovertible proof. In regulating on that basis, it is, we submit, entirely appropriate to define the applicable standards in terms which

will allow resort to the kind of evidence and considerations which any reasonable man, faced with a like inquiry concerning his employees, would resort to. Cf. *Adler* v. *Board of Education*, *supra*, at 493; *Garner* v. *Board of Public Works*, *supra*, at 720. A narrower standard might have risked jeopardizing our national security by allowing to remain within federal service persons whose loyalty could not be relied on, and might have imposed an impossible administrative burden. The choice of methods was, we believe, for the President.

II

THE ACTION TAKEN BY RESPONDENTS HEREIN FULLY CONFORMED TO THE REQUIREMENTS OF EXECUTIVE ORDER 9835, AS AMENDED

Petitioner's argument that the procedure followed by respondents did not conform to the requirements of the Executive Order rests primarily on Part V of the Order, as amended, which prescribed that the standard for the refusal of employment shall be that "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Construing the word "evidence" in its judicial sense, petitioner contends that the findings of the Loyalty Boards were not based on "all the evidence." He points out that those who gave in-

formation against him did not appear at the hearing, were not identified to him, and that no opportunity for cross examination was afforded. The Loyalty Boards, he asserts, had no knowledge of the informants' identity,[39] no knowledge of the officials who certified the information as coming from reliable sources, and hence were not in a position to exercise their judgment in weighing the credibility of the confidential reports. Petitioner contends, therefore, that "all the evidence" before the Loyalty Boards, *i. e.*, the sworn statements of petitioner and witnesses and affiants in his behalf were favorable and supplied no ground for belief that petitioner's loyalty was reasonably in doubt.

Petitioner further points out that Part II, Section 2a, provides that "an officer or employee who is charged with being disloyal shall have a right to an administrative hearing." Petitioner urges that, in light of the preamble to the Order which states that both the United States and the accused employee must be afforded "maximum protection," the "administrative hearing" prescribed must mean a hearing which meets the minimum standards of due process.

Admittedly, the words "evidence" and "administrative hearing" have an established juris-

[39] Respondents' answer alleges that the identity of one or more, but not all, of these informants was known to the Boards (R. 18, 20).

prudential gloss. It does not follow, however, that they were employed as words of art in the Order. The issue presented is simply one of Presidential intention. In this instance, these words take their meaning from an analysis of the Order as a whole. Placed in context, we submit that these terms do not comprehend "the formal and litigious procedures" which petitioner's interpretation would attribute to them. Cf. *United States* v. *Nugent,* 346 U. S. 1, 7.

In accordance with the Directives of the Loyalty Review Board (5 C. F. R. (1949 Ed.) Parts 210, 220), petitioner was informed by interrogatory, by letter of charges, and by statement of information of the nature of the evidence against him, insofar as security considerations permitted (R. 4, 17–18), was advised of his right to reply to the charges in writing (R. 4) and his right to have a hearing before a Loyalty Board at which he might present evidence in his behalf (R. 4). Hearings were held before the Loyalty Board of the Department of Health, Education and Welfare and the Loyalty Review Board. Petitioner was represented by counsel of his choice and testified personally. All affidavits offered by him were accepted, and all witnesses presented by him testified (R. 18, 19, 20, 21). Read as a whole, the Order required no more.

When the words "all the evidence" are placed in their proper context, it is plain that they were

intended merely to mean all the information available to the Loyalty Boards. It is equally clear that the Order did not specify that "all the evidence" must be revealed to the accused employee at the hearing. Part I, Section 3, of the Order provided that investigation shall be made "at all available pertinent sources of information," including files of the Federal Bureau of Investigation, files of any other appropriate Government investigatory or intelligence agency, and files of the House Committee on Un-American Activities. Part IV required that the names of confidential informants not be revealed. Part II, Section 2b, stated that the nature of the charges shall be set forth as specifically as, in the discretion of the employing agency, security considerations permit. Moreover, on March 13, 1948, the President, by Directive, unequivocally directed that reports, records and files relating to the loyalty program be preserved in strict confidence. 13 F. R. 1359. It is apparent, therefore, that the "maximum protection" intended to be afforded employees was that protection consistent with the dictates of security. Petitioner's argument that "evidence" was employed in its judicial meaning—that all witnesses must appear, either in person or by affidavit, in the proceeding

and on the record—is conclusively and emphatically belied by the Executive Order.[40]

Considered in this frame of reference, the words "evidence" and "administrative hearing," even if they stood alone, could not have the meaning for which petitioner contends. But they did not stand alone. The accused employee's rights during the hearing were twice explicitly defined in the Executive Order. He had the right to appear before the Boards personally, to be accompanied by counsel of his choice, and to present evidence on his behalf, through witness or by affidavit. Part II, Sections 2a, 2b (Appendix, *infra*). No other rights normally incident to a quasi-judicial hearing were specified. Indeed, such rights could not have been conferred consistently with the Presidential mandate that the identity of confidential informants be kept secret.

That a quasi-judicial hearing was not intended is conclusively manifested in The Report of the

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[40] In this connection, it should be noted that Judge Edgerton's dissenting opinion in the *Bailey* case, *supra*, was mistaken insofar as he was of the belief that the regulations of the Loyalty Review Board prohibited the appearance of all witnesses for the Government (182 F. 2d at 68). As pointed out above, n. 17, the Board's regulations provided that all reasonable efforts were to be made to induce all identified non-confidential witnesses, adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross examination. Since the Order did not grant the power of subpoena to the Loyalty Boards, witnesses could only be "invited."

President's Temporary Commission on Employee Loyalty (1947), which resulted in Executive Order 9835.[41] Paragraph 3c of Executive Order 9806, 11 F. R. 13863, which created the Temporary Commission, asked that body to recommend the procedure which should be established to guarantee a fair hearing. In language identical in substance to Part II, Section 2, of Executive Order 9835, which followed, the Commission recommended that (p. 36):

> An employee who is charged with being disloyal shall have a right to an administrative hearing before a Loyalty Board in the employing department or agency. He may appear personally, accompanied by counsel or representative of his own

[41] The Temporary Commission was established on November 25, 1946, by Executive Order 9806 (11 F. R. 13863). Its function was "to inquire into the standards, procedures, and the organizational provisions for (a) the investigation of persons who are now employed by the United States Government or are applicants for such employment, and (b) the removal or disqualification from employment of any disloyal or subversive person." The Commission was composed of representatives of the Departments of Justice, State, Treasury, War and Navy, and the Civil Service Commission. The Commission submitted specific recommendations for a revitalized Loyalty Program and suggested that its recommendations be effectuated by the promulgation of an Executive Order which would simultaneously provide for the abrogation of Executive Order 9300 (discussed *supra*, p. 77). Copies of the Commission's report were handed to appropriate members of Congress and were generally made available to the public. See *e. g.*, Corwin, *The President*, p. 432, n. 98.

> choice, with witnesses, and present any evidence, including affidavits, in his behalf. * * *

And, in explanation of this recommendation, the Temporary Commission stated (p. 29):

> Fair administrative process will provide an employee with the right to a hearing with counsel and witnesses, and even though he will not have the right of confrontation, he will have an opportunity to present his side of the case prior to adjudication.
>
> The action taken by a federal department or agency to remove an employee is administrative in character and a hearing conducted for such a purpose is an administrative hearing and not a judicial proceeding. * * *

Further, we think it significant, in ascertaining the President's intent in this connection, that dismissed Government employees have never been accorded a quasi-judicial hearing. As we have seen, the Lloyd-LaFollette Act, 5 U. S. C. 652, considered a landmark in civil service reform, requires no oral hearing whatever. And the Administrative Procedure Act, 5 U. S. C. 1001 *et seq.*, expressly excludes "the selection or tenure of an officer or employee of the United States other than examiners" from its hearing requirements (5 U. S. C. 1004). See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 260–261, 360.

It should also be noted that the Executive

Order was extensively criticized for failing to provide the procedure which petitioner here contends it did provide. Thus Professors Chafee, Griswold, Katz, and Scott, of the Harvard Law School, pointed out in a communication to the New York Times,[42] that

> There is no provision that the accused shall be confronted by such evidence as there may be * * * no requirement that the evidence against him shall be introduced at the hearing at all. * * * no requirement that the findings of the loyalty board must be supported by the evidence. In fact, there is no requirement that the loyalty board make any findings whatever.

See *e. g.*, to the same effect, Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L. J. 1, 101 ff. These criticisms were given earnest consideration by the then Chairman of the Loyalty Review Board, who, in a public statement, set forth in detail the reasons why such provisions could not, in his view, be adopted. See New York Times, December 28, 1947, p. 28, col. 2–6. As the court below cogently remarked in the *Bailey* case (182 F. 2d at 52): "If the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and

[42] New York Times, April 13, 1947, p. 8E, col. 5.

would have corrected the error."[43] Since the President failed to take such corrective action, we think it clear that the procedure followed by respondents fully conformed with the requirements of Executive Order 9835, as amended.[44]

Thus, the conformity between the requirements of Executive Order 9835 and the procedure followed here, and in the processing of all loyalty investigation cases, is clearly established by consideration of any of the traditional materials of legal analysis. Beyond this, a broad underlying

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[43] In this connection, it should also be observed that criticism of the provisions of the Executive Order was not confined to the pages of legal periodicals of limited circulation. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, four members of this Court expressed the view that, *inter alia*, Part III, Section 3, of the Order, which provided for the designation of organizations by the Attorney General, offended due process for want of a hearing. Further, Mr. Justice Frankfurter construed the Order as not precluding "an administrative procedure, however informal, which would incorporate the essentials of due process" (*Id.* at 172). Since no change in the listing procedure was made by President Truman or his Attorneys General as a result of this criticism, it can only be concluded that in this instance at least—putting to one side the question of the validity of the procedure—the administrative construction of the Order was not in error.

[44] "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414.

basis, applicable to the sweep of the problem posed by the case, fully validates these procedures.

Jealous concern for the protection of individual rights is, at all times, a central factor in every aspect of American life. And no elaborate demonstration is needed to remind this Court of the hard fact that the security of this country, or of any country constituting a part of the free world, requires not merely protection of its borders from external force but also protection within from subversive activities of widely varied types, including carefully controlled and disciplined use by an enemy of trusted public servants, actually disloyal or unreliable. In the past quarter century, country after country has learned this lesson to its great cost. See, *e. g.*, pp. 39–55 of Brief for Respondents in *Bailey* v. *Richardson,* No. 49, October Term, 1950.

The attainment of these two goals, to protect the individual while at the same time achieving effective implementation of a national security program, was the constant purpose of the loyalty program and the procedure utilized in that program. The elusive and complex aspects of this task have been as great as any which ever confronted a democratic government. Those members of the Executive Branch of the Government charged with the administration of President Truman's program, at all times aware of the magnitude of the responsibilities which they

faced, undertook to give, after much study, what they regarded as the maximum hearing process consistent with the paramount objective of the program—the protection of the Government from infiltration by persons whose loyalty was less than certain. We submit that, by virtue of their efforts, the program has been carried out in the fullest possible conformity with the basic Anglo-American tradition of individual liberty.[45]

Challenges to the program center on what we conceive to be an integral part of the effective processing of loyalty cases, the methods of investigation which yield information on questions of employee loyalty. Here again, it must be remembered that the purpose of the loyalty program was to erect a safeguard against damage to the national interest of a sort which, once it has oc-

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[45] The actual administration of the program, the safeguards provided, the regulations in protection of individual rights, are all in striking contrast to petitioner's apparent suggestion that the Government should have summarily dismissed employees without any hearing (Pet. Br. 10, 14–15). Petitioner argues that there would be "no objection to a complete repeal of all Civil Service protection of government employees" and that "the Constitution does not limit the power of the Executive summarily to terminate employment on secret information or for any other reason" (Pet. Br. 14–15). What petitioner is saying in effect is that every government employee with respect to whom available information led to charges and a loyalty hearing could have been—and should have been—summarily dismissed by the agency head, not on *grounds* but on mere suspicion. Had this kind of program been followed in the early years following the establishment of President Truman's loyalty pro-

curred, cannot be made whole or reached by conviction and punishment. Hence, to determine whether reasonable doubt as to loyalty exists, every piece of information, of whatever sort, which sheds any light on the issue must be gathered by investigative agencies, and as a matter of duty, turned over to the Boards, carefully selected,[46] which pass on particular cases after the

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gram under Executive Order No. 9835, many thousands of public employees would have been the victims of petitioner's gratuitously conceived method of dealing with the loyalty problem. It takes neither reference to the developments in that period or even any argument to be satisfied that had this kind of "loyalty purge" been followed, thousands of employees cleared under the Truman loyalty program and now performing useful public service, would have been victimized and every person leaving the Government in such circumstances would have done so under the cloud of the "loyalty purge," giving him the "badge of infamy" which petitioner decries. That this number is not negligible is demonstrated by the fact that, at the termination of the loyalty program in August 1953, the action of the loyalty boards had resulted in the clearance of 16,503 persons. In contrast, only 560 persons had been removed or denied employment on grounds relating to loyalty. See United States Civil Service Commission, 1953 Annual Report, p. 32, 29–31. Measured by the 4,756,705 individuals whose loyalty forms were checked during the period 1947–1953, these figures significantly show the care which was taken in the administration of the program to protect and safeguard individual rights.

[46] In the instant case, for example, the three members of the Loyalty Review Board panel who determined that there was a reasonable doubt as to petitioner's loyalty—John Harlan Amen, John H. Hessey, Sr., and Willard L. King—are seasoned and distinguished lawyers. See Who's Who in America, 1954–1955, pp. 57, 1210, 1468.

most careful examination and sifting of all available material.

The valid reasons for nondisclosure and the impact of any other course on the effectiveness of the various intelligence agencies of government is suggested in the statements of Chairman Richardson and F. B. I. Director Hoover in the published articles previously referred to. They emphasize what has been axiomatic in police and all other forms of government intelligence work, that certain necessary sources of delicate information do not survive disclosure. Informants, like eye witnesses to a crossing accident, must of necessity be the people who happen to be where the activity occurs. The natural human reluctance to become "involved" in any legal process is multiplied when dealing with the reliability of a person for public employment. The framers of President Truman's Executive Order 9835 were not unaware of this but they had to weigh the risks to the individual against the attainment of the legitimate objective of the Government. Informers must be judged on whether their contribution to the total government intelligence operations tends to protect the Government from sabotage, espionage and various forms of intrigue and subversion. No one contends that perfection exists in this sensitive and delicate area of human activity but its total efficiency and the need for its use can be appraised in part in comparing the widespread

sabotage of World War I (*e. g.*, Black Tom Explosion, etc.) and the total absence of known sabotage in World War II. A large area of vital government intelligence depends on undercover agents, paid informers, and casual informers who must be guaranteed anonymity. Thus, evidence which would be rejected under established legal doctrine in a criminal proceeding could well be the compelling reason for dismissal of an employee on loyalty grounds. An agency head or a loyalty board which would not give weight to information satisfactorily evaluated would be derelict in their respective duties.

Confidential information is necessarily gleaned from a wide variety of sources. In addition to information from confidential informants, a large percentage of the material included in the reports under the loyalty and security program is derived from the use of extremely delicate and confidential techniques. Information of a confidential character, both from individual informants and from the use of confidential techniques, is often developed in the course of espionage and sabotage investigation entirely apart from investigations under the loyalty and security program. Of necessity, the information thus developed as by-products of major espionage and sabotage investigations must be included, where relevant, in the investigative agency's reports on employee cases. Accordingly, disclosure of these

confidential sources of information and techniques of investigation would not only imperil the employee loyalty and security program but would also endanger the effective functioning of investigative agencies in the espionage and sabotage fields. Professional undercover agents of continuing utility not in one but in many cases and situations, casual informants in individual cases who would withhold information if confronted by the exigencies of appearing as witnesses in trials on the merits, highly confidential sources of information consisting of confidential government and non-government files, information obtained under a pledge of confidence—all these vital sources of information, and others, might well dry up, to the detriment of the basic security of the country, if petitioner's contention as to his overriding rights of confrontation and cross-examination were to be honored.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

Executive Order 9835

Prescribing procedures for the administration of an employees loyalty program in the executive branch of the government

Whereas each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

Whereas it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and sec-

tion 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I.—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not

completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American Activities files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular posi-

tions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II.—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to ap-

peal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III.—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the

investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV.—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to

disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V.—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connec-

tion with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI.—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE,
March 21, 1947.

EXECUTIVE ORDER 10241

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat.

403) as amended, and section 9A of the act approved August 2, 1939 (5 U. S. C. 118j), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

THE WHITE HOUSE,
April 28, 1951.

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FILED
APR 21 1955
HAROLD B. WILLEY, Clerk

NO. 376

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

JOHN P. PETERS, Petitioner

v.

OVETA CULP HOBBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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1. At the close of oral argument, the Chief Justice requested counsel for respondents to file a memorandum with respect to the validity of Regulation 14 of the Loyalty Review Board, which provides that the Board may post-audit and review any determination or decision made by any department or agency loyalty board even though no appeal has been taken. See 5 C.F.R. (1949 ed.) 210.14.[1/] We submit that Regulation 14 was fully authorized by Executive Order 9835.

The Loyalty Review Board was established by Part III, par. 1, of Executive Order 9835 (12 F. R. 1935). Sub-paragraph 1a provides that:

> "The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty

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1/ It should be noted that no question was raised by the pleadings with respect to the validity of Regulation 14. Similarly, this issue was not raised by the petition for a writ of certiorari. In this posture, it was assumed by counsel that this question was not presented for review and, for that reason, there was no occasion to brief it. Cf. Rule 23 (1)(c) of the Rules of this Court; Federal Power Commission v. Colorado Interstate Gas Co., No. 45, this Term, decided March 28, 1955; United States v. Tucker Truck Lines, 344 U. S. 33.

> by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned."

Were this the only grant of authority to the Board, perhaps something could be said for the view that Regulation 14 was not authorized by the Executive Order. But cf. Bates v. United States, No. 450 this Term, decided March 28, 1955, where the Court found no difficulty with a comparable construction problem. However, sub-paragraph 1-a does not stand alone. Sub-paragraph 1-b goes on to empower the Board to make "rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty." In addition, sub-paragraph 1-c directs the Board to "advise all departments and agencies on problems relating to employee loyalty" and to "coordinate the employee loyalty policies and procedures of the several departments and agencies." Regulation 14, we submit, is clearly authorized by this comprehensive delegation of power to the Board. On its face, sub-paragraph 1-a merely prescribes the minimum authority of the Board. It does not purport to limit the review power of the Board to the situations enumerated therein. It does not provide that this enumeration is all inclusive. So read, it does not preclude the Board from reviewing other determinations under the Executive Order where such review is "deemed necessary to implement statutes and Executive orders relating to employee loyalty" in order that the Board might properly carry out its functions to "advise all departments and agencies on all problems relating to employee loyalty" and to "coordinate the employee loyalty policies and procedures of the several departments and agencies."

As we have seen, conformity between the provisions of Executive Order 9835 and Regulation 14 is demonstrated if we resort only to the text of the Executive Order. But in the last analysis, the issue is simply one of Presidential intention. In ascertaining the President's intent in this connection, several factors are significant. To begin with, Regulation 14 was a contemporaneous construction of an executive regulation by the executive agency empowered to administer the regulation. Cf. Bowles v. Seminole Rock Co., 325 U. S. 410, 413-414. Regulation 14, in its original form, was promulgated by the Board at the very inception of the loyalty program. It was part of the first set of regulations issued by the Board on December 17, 1947, and was published in the Federal Register. See 13 F. R. 234. Accordingly, it cannot be assumed that the President and his staff were unaware of Regulation 14. Cf. Federal Crop Insurance Corp. v. Merrill, 332 U. S.380. But we need not rely upon conjecture or legal assumption. The post-audit procedure followed here was not an isolated instance. The Board's practice in this respect under Regulation 14 was given wide publicity and the President was specifically advised by the Civil Service Commission, in its Annual Reports to the President, of its operations under Regulation 14.[2/] Since no disagreement was indicated in the

2/ The Annual Report of the Civil Service Commission for the Fiscal Year Ended June 30, 1948, discloses (p. 10) that by September 30, 1948, a total of 1,107 decisions had already been post-audited. By the end of June 1949, 4,116 cases had been post-audited and in 6 cases during that year the Board had held new hearings under Regulation 14. Id., 1949, p. 37. By June 1950, 7,278 cases had been post-audited and new hearings held in 11 cases. Id., 1950, pp. 33-34. During fiscal year 1951, an additional 2,169 cases were post-audited and review on the merits was scheduled in 15 of those cases. Id., 1951, p. 36. During fiscal year 1952, the Board post-audited 5,335 cases and scheduled review on the merits in 10 of those cases. Id., 1952, p. 56. In the concluding year of the program, an additional 4,744 cases were post-audited and 22 of those cases were scheduled for review on the merits. Id., 1953, p. 31. It should be noted that the above post-audits cover cases closed on interrogatories as well as cases involving hearings and re-examinations following E. O. 10241.

face of this unequivocal action, it necessarily follows that the Board's interpretation of the Executive Order met with the approval of the President.

Further, Executive Order 10450 (18 F. R. 2489) which revoked and superseded Executive Order 9835, as amended, demonstrates Presidential knowledge and approval of Regulation 14. Section 11 of the present Executive Order expressly provides that after the effective date of the Order (i.e., May 27, 1953), the Loyalty Review Board "shall not accept agency findings for review, upon appeal or otherwise." [Emphasis added.] Section 11 also provides that "agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board * * *." These provisions wholly rebut the suggestion that Executive Order 9835 was intended to authorize the Board to review agency determinations only upon the appeal of the employee. They manifest Presidential awareness and approval of the Board's interpretation that review was authorized "upon appeal or otherwise" and that, in particular, the Board had authority to review agency determinations favorable to the employee.[3/]

In our view, the foregoing considerations are dispositive. But mention should also be made of Jason v. Summerfield,

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3/ As we pointed out during oral argument, Executive Order 10450 did not become effective until May 27, 1953. Accordingly, it was inapplicable to the instant case which was decided by the Loyalty Review Board on May 22, 1953 (R. 8.) It is difficult to see how Executive Order 10450 can be relied upon as a delegation of authority to pass on the instant case. Insofar as the question here is one of Presidential intention, Executive Order 10450 is plainly material since it evidences Presidential knowledge and approval of Regulation 14. Concededly, Executive Order 10450 was issued by a different President. But it is hardly to be suggested that President Eisenhower knew of Regulation 14 and that President Truman had no such knowledge.

214 F. 2d 273 (C.A.D.C.), certiorari denied, 348 U. S. 840, which was cited to the Court during oral argument. In that case, the Loyalty Review Board had, under Executive Order 9835, reversed the finding of the employing agency that reasonable grounds existed for believing that the employee concerned was disloyal. After this clearance, the standard was changed to "reasonable doubt as to the loyalty of the person involved" by Executive Order 10241. Thereafter, the Loyalty Review Board issued Memorandum No. 66, which provided for the re-opening by the employing agency of all cases which had been reversed on appeal or which had been reviewed by the Loyalty Review Board in its post-audit program. Pursuant to Memorandum No. 66, the employee's case was reopened and new hearings were held by the agency and the Loyalty Review Board, both of which resulted in the employee's dismissal. It was contended that the Executive Order did not authorize the reopening of the employee's case. The Court of Appeals rejected this argument, holding that "it is the continuing duty of any department or administrative agency to execute its functions in such fashion as may be required to effectuate its purposes and to accomplish its objectives." 214 F. 2d at 278. Although the facts in Jason are not identical to those involved here, the issue as to power to conduct a post-audit is substantially the same. If sub-paragraph 1-a, Part III, of Executive Order 9835 (supra, p. 1) be read as limiting the Board's power to review of unfavorable decisions, the Board had no power to reopen a determination favorable to the employee. But as we have shown above, and as the Court of Appeals recognized in Jason, Executive Order 9835 did not so limit the Board's authority.

In short, whether resort be had to textual analysis alone, to "legislative" history, or to judicial decision, it is difficult to see how there can be any question with

respect to the validity of Regulation 14 of the Loyalty Review Board. 4/

2. At the close of oral argument, the Chief Justice recalled counsel for respondents and requested him to clarify counsel's earlier statements with respect to the availability to the Court of the record herein. It is apparent that the confusion may have inadvertently resulted from colloquies with the Court in which the word "record" was employed in three senses by as many members of the Court. The first sense, of course, is the Record in this litigation which is presently before the Court, consisting of 29 printed pages of the pleadings, motions, stipulations of counsel, and actions of the courts below. The second sense in which the word "record" was used is the administrative record of the Board which was made available to petitioner. This record comprises the charges against petitioner, petitioner's reply to the charges, the summary of information furnished to petitioner by the employing agency prior to the hearing, the transcripts of the hearings

4/ As we understand the import of the Court's inquiry on this score, the Court has in mind its oft-repeated rule that constitutional questions should not be decided in advance of the necessity for doing so. But we question whether a limited construction of Executive Order 9835 as to the scope of review power of the Loyalty Review Board would provide any genuine disposition of this controversy. If the case were now to be remanded on this technical issue, further administrative handling, if any were possible, would probably be controlled by Executive Order 10450 with its sharply differing standards and procedures. On the assumption that loyalty boards and procedures under Executive Order 9835 would be available on remand, a decision here that the Loyalty Review Board had no authority to post-audit petitioner's case would leave standing the favorable determination of the agency board. However, under Executive Order 9835, that determination is not final. The order vests personal responsibility in the head of the employing department or agency. Accordingly, on remand, there would be a recommendation but no decision outstanding as to petitioner's loyalty and the Secretary of Health, Education and Welfare would presumably have to reach a final result on all the factors available for her consideration. There is nothing to indicate that the conclusion reached by the Secretary would necessarily be favorable to petitioner. An unfavorable decision would, of course, raise the same constitutional issues which are here presented for decision.

before the agency loyalty board and the Loyalty Review Board, affidavits and letters, and other documentary exhibits introduced during those hearings. It is this record which the Government is free to furnish to the Court with petitioner's consent.[5/] The third sense in which the word "record" was employed covers the total record considered by the Board, i.e., the foregoing "record" and all investigative agency reports in the possession of the loyalty boards.[6/] It is this latter material--the investigative agency reports--which is not available under the 1948 Presidential directive.

In this connection, we think it appropriate to point out that making these investigative agency reports available to the Court would not resolve the issues brought to this Court by petitioner. The central issue is not whether this

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5/ In this connection, we should like to clarify an answer given by counsel to an inquiry from the bench as to the contents of the "record" before the Loyalty Review Board in comparison with the record before the agency board. Counsel for the Government stated that the Court was correct in assuming that the Review Board had nothing before it that was not before the agency board except for the additional witnesses called by petitioner. This statement is correct. However, it should be pointed out that the transcripts of the two hearings differ in that petitioner was subjected to a more intensive examination and cross-examination with respect to his membership in, affiliation with, or sponsorship of specifically named organizations on the Attorney General's list and his motives for such activities on his part. Whether examination of the record of the Loyalty Review Board would be of assistance to the Court is, of course, for the Court to determine. In this connection, it is our understanding that the Court's rules would not require printing of the record in any case, so that no additional expense would be imposed on anyone.

6/ "Record" in this third sense consists of "all the evidence" on which loyalty determinations were to be made. In addition to the material set forth in our brief to demonstrate that "all the evidence" consists of no less than this full record, any suggestion that Executive Order 9835 intended the words "all the evidence" to call for names or personal testimony of confidential informants is flatly refuted by the Order itself in those provisions of Part IV, §2, reading: "...the investigative agency may refuse to disclose the names of confidential informants, provided" it furnishes certain stipulated alternative information about the informants. The Board was thus the judge of the sufficiency of the reasons for withholding names and the Regulations permitted them to call for added information or the production of the investigative agents to develop this inquiry. The extent and manner in which boards exercised this power and what standards of sufficiency were established was a matter of administrative experience.

Court, or the courts below, would have reached the same result as the Loyalty Review Board on the basis of the information before that Board. Petitioner's claim is that he was entitled to confront and cross-examine the confidential informants whose information was summarized in those reports. Judicial evaluation of the Board's evaluation of such information, and of the sufficiency of the reasons for withholding the identity of informants, would be no substitute for the rights claimed by petitioner under the Due Process Clause. Where due process requires disclosure its standard cannot be satisfied by an ex parte examination by the Court sitting in camera. It is, of course, our firm conviction that due process in the context of this case and the constitutional problem here presented, does not require disclosure and confrontation. If we be correct in our position and the reasons for it (see e.g., our Brief, pp. 62-66, 102-106), then in camera review would be improper.[7] That we are correct is, we believe, demonstrated by precedent and analysis, fully covered in our brief and in no way refuted by anything adduced on petitioner's behalf. It is crucial that such precedent and analysis be followed and applied and not be blurred by other considerations. As Mr. Justice Holmes observed in Northern Securities Co. v. United States, 193 U. S. 197, 400-401 (quoted with approval in a concurring opinion in Dennis v. United States, 341 U. S. 494, 528): "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their

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7/ "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. * * * [such decisions] are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." C. & S. Air Lines v. Waterman Corp., 333 U. S. 103, 111.

real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

Finally, the statement of Government counsel that he had seen part of the reports also requires clarification in the light of subsequent questions. Counsel did not suggest or intend to indicate at any point that he had seen the "raw" files which had not been made available to the loyalty boards. Counsel meant only that he had seen some but not all of the investigative agency reports which had been in the possession of the loyalty boards. Accordingly, there is no question involved here of information being made available to counsel which was not made available to the loyalty boards. Nor is it correct that cabinet officers cannot see FBI reports. They do receive the same reports as the boards but not the names of confidential informants. 8/

8/ Parenthetically, it should be noted that there is no basis for the suggestion of a member of the Court that "underlings" in the investigative agencies are empowered to decide who is to be trusted with the identity of the confidential informants. No question of trust or reliability is involved. No one suggests that the members of the Loyalty Review Board or the Judiciary are not to be trusted with such information. The identity of confidential informants is withheld solely because the information obtained from such informants is obtained under a pledge of confidence or where the source is an undercover agent of the FBI. Necessarily, if the pledge of confidence is breached, these sources of information would dry up. It has been suggested that if relevant information can be obtained only by faithfully observing a pledge of confidence, the Government should not utilize such sources of information. It would be intolerable indeed, if, observing this suggested standard of Executive operations, a case arose where the sole proof of disloyalty was obtained by an undercover FBI agent engaged in other vital work with a subversive group. Can it be seriously urged that the FBI not give such confidential information to another branch of the Government as an alternative to producing the agent in a hearing--thus destroying extensive counter-espionage work of that agent? In our view the Constitution does not require this choice, and the national security calls for an exactly contrary conclusion.

3. After counsel for respondents had been recalled by the Chief Justice at the end of oral argument, Mr. Justice Frankfurter asked counsel to advise the Court whether there was a regulation issued in 1952 by the Civil Service Commission explaining that the President's directive is not a restriction upon the availability of personnel records at the request of any agency or the Judicial Branch of the Government. Presumably, Mr. Justice Frankfurter had reference to Memorandum No. 45, Revised, Supplement No. 1, dated August 22, 1952. This Memorandum provides that personnel records may be furnished to agencies of the Legislative Branch, the Judicial Branch, or the District of Columbia where "the records are requested solely in connection with the appointment or transfer of personnel presently or formerly employed within the Executive Branch," and where "as to such personnel the requesting agency agrees to comply with the terms and provisions of the above-cited letter of the President and with the regulations of the Loyalty Review Board regarding the furnishing of information on loyalty matters." Since petitioner is not being considered for appointment by the Judicial Branch of the Government, this Memorandum has no applicability. For the convenience of the Court, the text of the Memorandum is set forth in the appendix, infra, pp. 11-12.

Respectfully submitted,

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APPENDIX

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

August 22, 1952

MEMORANDUM NO. 45, REVISED, SUPPLEMENT NO. 1

TO ALL EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Information which may be furnished by Government agencies with regard to loyalty matters under Executive Order 9835, as amended.

A question has been raised as to whether the instructions in the President's letter of April 3, 1952, to the Secretary of State and Memorandum No. 45, Revised, prohibit the release of Official Personnel Folders containing the results of proceedings under Executive Order 9835 to agencies of the (1) Legislative Branch, or (2) the Judicial Branch, or (3) the District of Columbia when such agencies appoint former employees of the Executive Branch.

Such agencies may be given access to the personnel records of agencies of the Executive Branch provided:

(a) that the records are requested solely in connection with the appointment or transfer of personnel presently or formerly employed within the Executive Branch, and

(b) that as to such personnel the requesting agency agrees to comply with the terms and provisions of the above-cited letter of the President and with the regulations of the Loyalty Review Board regarding the furnishing of information on loyalty matters.

When an agency of the Legislative Branch, the Judicial Branch, or the District of Columbia requests the personnel record of an employee or former employee

of the Executive Branch, the agency receiving the request shall furnish to the requesting agency a copy of Loyalty Review Board Memorandum No. 45, Revised, and its attachment, a copy of the President's letter of April 3, 1952 to the Secretary of State. Copies of the memorandum and the letter will be furnished upon request by the Loyalty Review Board for this purpose.

The agency of the Executive Branch receiving the request for the personnel record shall obtain a statement signed by the head of the requesting agency, or by a person designated by such head, to the effect that the personnel record is requested solely in connection with the appointment of the individual involved and that they agree to comply with the terms and provisions of the President's letter of April 3, 1952, to the Secretary of State and Loyalty Review Board Memorandum No. 45, Revised, to all Executive Departments and Agencies, regarding the furnishing of information on loyalty matters. Upon receipt of such a statement, the personnel record may be released.

/s/ Burton L. French

Burton L. French
Acting Chairman
Loyalty Review Board

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 1955, I served a copy of this supplemental memorandum on counsel for the petition by mailing a copy thereof first-class mail to:

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1229 - 19th St., N. W.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 376

JOHN P. PETERS,

Petitioner,

vs.

OVETA CULP HOBBY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF ENGINEERS AND SCIENTISTS OF AMERICA, AS *AMICUS CURIAE.*

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IN THE

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OCTOBER TERM, 1954.

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vs.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF ENGINEERS AND SCIENTISTS OF AMERICA, AS *AMICUS CURIAE.*

The Interest of Engineers and Scientists of America.

This brief *amicus curiae* is filed pursuant to Rule 42 of the Rules of the Court, with the consent of petitioner and respondent.

The constitutional issue before the Court is the validity under the due process clause of petitioner's dismissal from federal government employment on the basis of a loyalty hearing in which there was no disclosure of investigatory information considered by the hearing board, no disclosure of the identity of confidential informants, and no opportunity to confront and cross examine unknown but adverse

informants. In that issue, the Engineers and Scientists of America has a direct interest.

We are a federation of thirteen labor unions who are the bargaining agents representing engineering and scientific professional and sub-professional employees of companies throughout the nation engaged in work closely related to defense activities. Among such employing companies are: Western Electric Company, Radio Corporation of America, the Lockheed, Boeing, and Convair Companies in the aircraft industry, Sperry Gyroscope Company, Minneapolis-Honeywell Regulator Company, Arma Division of American Bosch, the Tennessee Valley Authority, etc.

Included in our membership are Aerodynamics Engineers, Dynamics Engineers, Electronics Systems Engineers, Wind Tunnel Test Engineers, Stress Engineers, Physicists, Chemists, and Metallurgists. Their work is of a highly specialized nature, finding industrial application almost entirely in defense or defense connected employments in the aircraft, electrical machinery, electronics, and scientific instruments industries.

Under the Industrial Personnel Security Program of the United States Department of Defense, the scientist engaged in private employment in defense industry is subject to dismissal from his private employment on the basis of the same kind of hearing afforded petitioner and is not granted any of the procedural rights denied petitioner. Petitioner was dismissed from non-sensitive employment. Our scientists are engaged in highly sensitive employment directly concerned with classified matters of military secrecy. If the loyalty hearing accorded to petitioner suffices under our Constitution, the Defense Department will continue to force the security dismissal of our engineers and scientists without the opportunity for confrontation and cross-examination, and without disclosure of the

material considered or the confidential informants listened to; in other words, with no knowledge of the "evidence" against them or its source.

We are before this Court because of our conviction that the narrowing or elimination of due process reflected in this Court's decisions in the alien, Nisei, and conscript cases,[1] will, if extended to all government positions, inevitably be applied to the bulk of our entire working population. In time of emergency, substantially all industrial activity is defense related.

Statement of Facts.

For the purpose of our presentation, we adopt the Statement of Facts presented by the petitioner.

The Issues.

Our argument is directed to the following issues:

1. Whether a federal government loyalty or security hearing is required by the Constitution to accord with due process; and

2. Whether a hearing accords with due process, if the accused is not informed of the identity of his accusers, and not provided with the opportunity to confront and cross-examine his accusers, and decision is made on consideration of information not revealed to him.

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[1] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953); *Korematsu* v. *United States*, 323 U. S. 214 (1944); *United States* v. *Nugent*, 73 Sup. Ct. 991 (1953); respectively.

ARGUMENT.

POINT I.

A Federal Government loyalty or security hearing is required by the Constitution to accord with due process.

We do not burden the Court with repetition of the able argument presented by counsel for the petitioner. We do suggest some facts and considerations which, in our view, are pertinent and deserving of emphasis and attention.

1. *First, this case is not resolved by the deceptively simple thought that no one has a right to public employment.* Public employment, alone, means millions of citizens employed by the federal government, and millions more employed by state and local governments. Even as to these public employees the assertion of no right to public employment only obscures the issue by a "facile generalization." The Court, in *Wieman* v. *Updegraff*, 72 Sup. Ct. 215, 344 U. S. 183 (1952), said (at 344 U. S. 191):

> "We are referred to our statement in Adler that persons seeking employment in the New York public schools have 'no right to work for the State in the school system on their own terms'. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory."

But resolution of this case will determine the constitutional protection against loss of private employment, or

lack of such protection, for citizens generally throughout the country.

The Government's Industrial Personnel Security Program is the twin of the Government's old federal employees loyalty program and more recent federal employee security program. These programs have substantially the same provisions, and are all precisely alike in the type of hearing permitted. Hence, it is not just the public employee who seeks protection here, but every man and woman, scientist, engineer, professional, or just plain worker employed privately in our vast defense industry and subject to dismissal, like petitioner, when the Government's security clearance is denied.

The total figure for those thus affected is not obtainable. Plainly, though, resting on the determination of petitioner's rights are the rights to livelihood of a large part of our working population; and the area of private employment affected is a major part of American industry. Yet, since *Truax* v. *Reich*, 239 U. S. 33, 41, the right of the citizen, indeed also the alien, to due process protection in pursuit and retention of his lawful livelihood can scarcely be doubted.

2. *The assertion, even when well documented, that the Government may dismiss employees for a variety of reasons without a hearing of any sort is no answer to dismissal pursuant to a highly publicized program of rooting out persons branded as disloyal.* Discharge from public or private employment may stem from a multitude of reasons or from none at all and carry with it a minimum of stigma. This cannot be said of dismissal arising out of a determination of disloyalty when it has been held out to the public that such determination resulted from a hearing. The facade of a hearing in the disloyalty program suffices to convince the public that actual disloyalty has been proved.

More than the loss of a particular job is involved. Lost, also, is the ability to obtain employment in that large segment of private industry performing government contractual work. Lost, too, are reputation, opportunity, community standing, pursuit of happiness, the carefully built structure of an entire life. These are the results of a determination of disloyalty or security risk. They are equal in all respects to the consequences of a verdict of guilty after trial, except that no rehabilitation is available.

The weight of a governmental determination of disloyalty or security risk cannot, realistically considered, be dissipated by the lonely cry that there was no fair hearing, that the result was dictated by information from informants unknown[2] even to the agency imposing the brand.

Fair hearing, we submit, is a concept not generally understood by those Americans who have yet to suffer from lack of it.

What this Court said in regard to organizations in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, is doubly applicable to individuals who do not possess even the facilities of organizations to publicize the complete circumstances of an adverse determination:

> "When the acts of . . . the Loyalty Review Board are stripped of the Presidential authorization claimed for them by the respondents, they stand, on the face of these complaints, as unauthorized publications of admittedly unfounded designations of the complaining organizations as 'Communist'. Their effect is to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation. The complaints, on that basis, sufficiently charge that such acts violate

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[2] This degree of protection by anonymity extends to the occasional informant, who may be a disgruntled neighbor, a competitor, someone with a real or fancied grievance, a vicious scandalmonger, a jealous person motivated by any sense of instability, etc.

> each complaining organization's common law right to be free from defamation. 'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' Restatement, Torts, Sec. 559" (341 U. S. at p. 139).

As recognized in the *Joint Anti-Fascist Refugee Committee* case, the well-established right to be free from defamation (see Note, 191 A. L. R. 709) is invaded by the Government when Government action, without a fair hearing, "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The language just quoted precisely describes what happened to petitioner and all others dismissed under the Government's loyalty and security programs. In accordance with the doctrine of *Joint Anti-Fascist Committee* such dismissals must be based on due process, *i. e.*, a fair hearing.

POINT II.

The hearing afforded to petitioner did not accord with due process.

1. *Unlike some due process questions, the question here needs no "balancing of interests"; for the hearing afforded to petitioner could not be considered a due process hearing in any circumstances.*—Petitioner's hearing was required to accord with due process (Point I, *supra*). Due process, at the very minimum, requires fair notice and opportunity to defend. Petitioner had, and the many millions of citizens, publicly and privately employed, now subject to the Government's security programs, have no opportunity to defend in any meaningful sense. Petitioner was never informed

of the identity of his accusers; was never afforded a opportunity to confront and cross examine them; and wa dismissed on a consideration of information not reveale to him. So he was deprived of the very guts of a fa hearing.

Since we deal here, essentially, with serious prejudi to the basic right of making a lawful living, the observ tions of a unanimous Court, speaking through Mr. Justi Cardozo in *Ohio Bell Telephone Co.* v. *Public Utilities Com mission*, 301 U. S. 293, 303, are particularly pertinent:

> "From the standpoint of due process—the pr tection of the individual against arbitrary action a deeper vice is this, that even now we do not kno the particular or evidential facts of which the Com mission took judicial notice and on which it veste its conclusion. Not only are the facts unknown; the is no way to find them out. . . . *This will never do hearings and appeals are to be more than empt forms.*" (Italics supplied.)

And see to the same effect the comment of Mr. Justi Douglas on *Bailey* in his concurring opinion in the *Joi Anti-Fascist Refugee Committee* case (341 U. S. 123, 180

2. *If we balance the interests involved here, the hea ing afforded petitioner still lacks due process.*—In *Baile* the Government emphasized and a majority of the cou below accepted "national security" as paramount. S *Bailey* v. *Richardson*, 182 F. (2d) 46 (C. A. D. C.), aff'd 3 U. S. 918.

Observe, first, that no military or national defen secrets, as such, would be divulged if accused employees a permitted to confront and cross examine their accuser The worry is that informers would be discouraged fro supplying further information if they are subjected to t

ordeal of testifying. It is respectfully doubted whether this consideration, of some importance in easing the burden of investigative agencies[3], overrides the denial of fundamental rights to a very large number of citizens. As Judge Albert Reeves, in the *Coplon* case, said:

> "If it turns out that the Government has come into court exposing itself, then it will have to take the peril. If it embarrasses the government to disclose relevant material, then the government ought not to be here."[4]

More important considerations of national security indicate the need for application of due process standards. In a very substantial sense, it is the employee in public and private employment who contributes the secrets to be guarded in the national security.

The achievements, for example, of the engineers and scientists represented by ESA in safeguarding the security of the nation against possible enemy attack are extremely significant. They have participated in the planning, designing and construction of long-range strategic jet bombers, such as the B-47, B-52, XB-58 "Hustler," as well as jet fighters, vertical take-off fighters, and turboprop and turbojet transports. They have also made notable contributions in the field of aircraft equipment, such as automatic pilots and landing aids, flight instruments, central fire control systems and gas turbine, ramjet and atomic-powered engines. The giant search radar systems now being

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[3] In our collective, professional experience we have yet to see a loyalty or security case in which an F. B. I. agent working internally in the Communist Party was indicated as the informer rather than a neighbor, working associate, college classmate or the like. Like any other citizen, such a casual informer should not be protected because he does not want to testify. Rather, should his statements be disregarded as unreliable for that reason.

[4] See Barth, "How Good Is an F. B. I. Report?", Harper's Magazine, March 1954, p. 28.

developed, which will be used to screen the United States off the Atlantic and Pacific Coasts, and in the northern part of Canada, represent in large measure the highly specialized abilities of engineers and scientists employed in defense plants. A most important area of national defense, i. e. the NIKE defensive guided missile (ground to air), now under construction around all major cities of the United States to defend them from enemy bombing attacks, is being achieved through the active participation of our engineers and scientists.[5]

Today the Government stands in vital need of such services. In the fiscal year 1955, federal agencies will obligate an estimated 1.99 billion dollars for research and development activities. Research and development for national security accounts for about 85% of the federal science expenditures. The Department of Defense accounts for approximately 75% of the funds appropriated by federal agencies for research and development.[6]

As of January 1952, the latest date for which figures are available, approximately half of the research engineers and scientists were employed on projects sponsored by federal agencies—in nearly every case the Department of Defense or the Atomic Energy Commission.

Yet the contribution of such public and private employees is prejudiced by governmental loyalty and security programs lacking in the minimum fairness that fulfills due process. The scientists of America are badly disturbed. Of that there can be no real doubt. The Federation of Scientists of America, the head of the National Academy of Scientists, and many of its leaders, have repeatedly challenged the lack in the Government's loyalty and security

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[5] This paragraph deals with non-restricted matters now in the public domain. Many more items are in restricted categories.

[6] Press Release, National Science Foundation, October 2, 1954.

programs of those procedural rights which Americans have rightfully come to regard as inviolate. Dr. Vannevar Bush, President of the Carnegie Institute and head of the Office of Scientific Research and Development in World War II stated before a Government Operations Sub-committee of the House of Representatives that the government's security risk program had demoralized the scientific community and had hindered the nation's weapons research programs. He added that the mutual respect between the military services and the scientific community achieved during World War II had been "almost destroyed, and one of the primary reasons was the security system."[7]

Dr. John von Neumann, mathematician and weapons expert of the Institute for Advanced Study of Princeton, New Jersey, recently appointed by the President to the Atomic Energy Commission, told the same sub-committee that the security program presented the "major problem" in the research and development field today. He said that the partnership between science and Government had been "damaged and endangered."

The Board of Directors of the American Association for the Advancement of Science, the largest and most influential group of related scientific organizations in the world, representing 256 scientific societies and academies with an aggregate membership of more than two million persons, in a statement published in the December issue of *Science*, the official publication of the organization, raised serious questions about the entire handling of the security program in so far as it related to the scientists of America.

This outstanding association insists that it is just as important to ask "What risk of delayed progress and diminished achievement is incurred in not employing a person?" as it is to ask "What security risk is incurred in employing such person?"

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[7] New York Times, October 19, 1954, pages 1 and 12.

Significantly enough, these authorities stated "that there simply are no such things as permanent scientific secrets."[8]

We respectfully suggest that the choice is not difficult between national security through achievement, which has been unquestionably brilliant, and national security through unfair procedure in elusive protection of secrecy, which has been brilliantly questionable.[9]

Pertinent to a consideration of national security is the fact, sometimes overlooked, that the state exists for its citizens and not vice versa. Hence, the balancing of interests requires notice of the heavy burden imposed upon petitioner and the many citizens in public and private employment now subject to the Government's security programs. Except infrequently and fortuitously, there is no protection against the bias of confidential informants.

For example, a Western Electric engineer caught a postman purloining Veterans Administration checks from his mail. When the engineer pressed charges against the postman resulting in his conviction and imprisonment, people living in the neighborhood of the engineer's home were aroused against the engineer because the postman had a large family and was apparently well liked. The immediate consequence of the engineer's perfectly proper act was the filing of anonymous reports with the F. B. I. by several of the engineer's neighbors regarding his home life, his general behaviour and his associations—all derogatory. The engineer was able to obtain ultimate clearance

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[8] New York Times, December 10, 1954, pages 1 and 30. And see also, in this same connection the statement of the American Association of Scientists, through its director, published in the New York Times, December 10, 1954, pages 1 and 30.

[9] For documentation of the fact that there have been many holes in the Government's dikes of secrecy, we respectfully refer the Court to the persuasive and eloquent presentation of the Solicitor General on the point in the *Bailey* case (pp. 48 to 55 of the Government's brief).

after much expense and effort only because he was in a position to associate the wholly unfounded accusations against him with the incident described above.

Likewise, there is no protection against mistakes in identity, and the bias or mistake of the investigator. In the recent *Chasanow* case, two key persons, recorded in the file as adverse, confidential informants, turned up at the security hearing to testify that they had been misquoted in all material aspects by over-zealous investigators interested only in adverse information.[10]

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[10] In view of the F. B. I.'s generally well-earned reputation, we may fairly consider F. B. I. reports to be better than those of other investigative agencies. The F. B. I.'s reports, not revealed to the employee, are usually accorded overwhelming weight by hearing boards and agency deciding officials. Such officials are impressed by the F. B. I. reputation, and, in any event, they are not supplied with the data for evaluation of the reliability of information furnished from undisclosed sources. But how good is an F. B. I. report?

Arguing against the surrender of F. B. I. reports to a Congressional Committee in 1941, Hon. Robert H. Jackson, at that time Attorney General, said:

> "Investigative reports include leads and suspicions and sometimes even the statements of malicious and misinformed people." (Reported in "How Good Is An F. B. I. Report" by Alan Barth in *Harper's Magazine*, March 1954, page 46.)

In her careful study, The Federal Loyalty-Security Program, published by the Cornell University Press in 1953, Eleanor Bontecou, a member of the New York Bar, provides interesting excerpts from transcripts of Loyalty Board proceedings, which suggest that F. B. I. reports contain some strange material.

In the Senate debate which took place in March 1953 over the confirmation of Charles Bohlen to be Ambassador to Russia, it was stated that the Security Director of the State Department, R. W. Scott McLeod, had found that "he could not clear Mr. Bohlen on the basis of the F.B.I. report." After Secretary of States Dulles had summarily overridden Mr. McLeod, one of the members of the Foreign Relations Committee, which unanimously approved the nomination, Sen. Guy M. Gilette gave the Senate the following account of one of the several items of derogatory information about which Secretary Dulles had told the Committee in detail:

> "One of the derogatory reports—and it was a derogatory report, and Senators may evaluate it, along with members of the Committee on Foreign Relations—concerned a

Indeed, there is no protection. Petitioner complains of the deprivation of the most basic elements of a fair hearing. But that deprivation occurred, and occurs today, in a relevant context providing none of the other safeguards typical of a full hearing. In the Government's loyalty and security programs, the standards of decision are vague—"doubt as to loyalty," "clearly consistent with the security of the United States." One can get out of those standards precisely what one puts into them. The "criteria" are even vaguer. Read, for example, section 8 of Executive Order 10450 which governs the federal employee security program. The charges are indefinite. Executive Order 10450, Section 8 (1) (i) provides the following criterion: "Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy." Since charges are required to be specific only insofar as "security considerations permit," charges like the following are not untypical.

> "Information at hand shows that you have attended meetings and actively participated in subversive organizations and have close associations with known members of the Communist Party."

"Security considerations" usually do not "permit" identification of these meetings as to time and place, on the

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person who said he possessed a sixth sense, in addition to the five senses all of us possess. * * * This man said that he looked at Mr. Bohlen and, with this sixth sense of his, he determined that Mr. Bohlen was a man who did have in the back of his mind such a tendency towards immorality as to make him unfit" (Barth, *supra*, pp. 27-38).

It all brings to mind an old doggerel:

> "Absolute evidence have I none,
> But my aunt's charwoman's sister's son
> Heard a policeman on his beat
> Tell a housemaid in Downing Street, etc."
>
> (New York University's Seventh Annual Conference on Labor, Bender Publishing Company, page 476.)

ground that this might supply information which could lead to the identification of informers. Indeed, it is not unusual for the Security Board to refuse to identify even the alleged "subversive organizations" on the same ground. Requests for particulars are generally denied. At least one security Hearing Board has ruled that the description of a person in a charge as a "known communist" means "known to the Government as a Communist" and, therefore, cannot be controverted—even by a sworn denial and proof that the person is currently employed in another agency of the Government.

Witnesses favorable or adverse, cannot be subpoenaed. Industrial personnel security hearings can be held only in New York, Chicago and San Francisco.

Security Hearing Boards are selected with considerable care and are protected by anonymity; but the decision rests in every case with the head of the agency concerned, a political officer responsive to misinformed political and public pressure (Cf. *Condon*); and generally that responsibility of the head of the agency is delegated to a subordinate political officer who may go further than his chief in protection of the Chief. The reasons for a hearing board's decision are not furnished to an employee, except by error as in *Chasanow*.[11] There is no provision for argument, written or oral, to the deciding officer. The employee may retain and appear with counsel; but counsel operates under the same burden as does the employee. Financial resources essential for the preparation of such defense as can be made are limited by an apparent average of not less than six months of no pay between charges, with suspension automatic, and final deci-

[11] The Chairman of the Security Hearing Board in the *Chasanow* case read the regulations as requiring the Board's reasons for decision to go to Chasanow. This was officially regarded as an error by the Navy Department; and, thereafter, the regulations were clarified so that no such errors would be made in the future.

sion. And all of this is kept from the light of day by provision for complete secrecy in protection of the employee.[12]

Such hearings are not held to punish for past conduct. Rather, the controlling consideration is fear of future behavior as guessed at from past, alleged conduct. This factor favors the fullest application of due process. As Mr. Justice Jackson so pungently observed:

> "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed."
>
> * * * * * *
>
> "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone" (*Shaughnessy* v. *United States,* Dissenting Opinion, 345 U. S. 206, 225, 228).

Finally, but with diffidence, we suggest a consideration believed not to be amiss. Even with a free people, due process ever stands uneasily. And today in many fields the standing is precarious. Encouraged by the presence of the Government's Industrial Personnel Security Program, private employers arrogate to themselves the right to determine, without even the facade of a hearing, that employees are security risks. (*Fitzgerald* v. *Sperry Gyroscope Company,* New York Supreme Court, Special Term, Part I, New York County, 22 LA 186; aff'd. Appellate Division,

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[12] The absence of the procedural safeguards to which reference is made in the text is apparent on the face of the controlling governmental regulations. So far as it is not, citations from secret proceedings are not possible. However, counsel are officers of the Court, and have a collective professional experience in the handling of loyalty and security cases that is considerable.

First Department, 131 N. Y. S. 2d 873 (1954); *Matter of Arma Corporation,* 22 LA 325 (1954), Curtis G. Shake, Arbitrator); See also *Sperry Gyroscope Co.* v. *Engineers' Ass'n.,* 279 App. Div. 630, 107 N. Y. S. 2d 800 (1st Dep't.), aff'd, 304 N. Y. 582, 107 N. E. 2d 78 (1951). And local town boards hold "hearings" to determine the political qualifications of a person who applies for renewal of a license to deal in second-hand pianos.

Other constitutional rights falter in the general weakness. Cued by regulations issued under Executive Order 10450, as amended by Executive Order No. 10491 (which included the added criterion of refusal to testify before a Congressional Committee regarding disloyalty or other misconduct), large industrial employers, sometimes on their own volition and other times at the instigation of a U. S. Senate subcommittee, have discharged employees who pleaded the Fifth Amendment before such subcommittees.[13] Employees in many industries are required to sign loyalty oaths similar in form to that which this Court regarded as arbitrary and therefore unlawful in *Wieman* v. *Updegraff,* 344 U. S. 183 (1952). And even university debate of a touchy subject like recognition of Red China becomes questionable.

It becomes more and more true that no one is so highly placed in America, (e. g., Mr. Acheson) or so lowly placed in obscurity (e. g. Mrs. Moss) as to be certain that his reputation will not be ruined and his livelihood prejudiced tomorrow by a legislative hearing or other action lacking in due process.

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[13] For example, Bethlehem Steel, General Electric, Ingersoll-Rand; see *Daily Labor Report Nos. 235, 236 and 239,* December 6, 7, and 10, 1954. A Defense Department spokesman confirms reports that Bethlehem Steel has no classified contracts at the present time, *Daily Labor Report No. 239*

We won the war. But the greatest people and most powerful nation in the history of mankind remain frightened; and so liberty weakens.

We recall that "the history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U. S. 332, 347 (1943); and that "every oppression against law, by colour of any usurped authority is a kind of destruction . . . and it is the worst oppression that is done by the colour of justice." Coke, *Second Institutes* (1656) p. 48.

The Court is called upon here to perform the greatest task of the judicial function:

> "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders . . . Great maxims, if they be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to social needs."[14]

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[14] Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), pp. 93-94.

Somewhere, sometime, the line of due process application to the loyalty-security field must be held by the judiciary in preservation of the liberty of a free people. The time is overdue; and the appropriate occasion is here.

Conclusion.

We respectfully urge that this Court reverse the judgment below and remand the cause to the District Court for the entry of judgment for the plaintiff, declaring that petitioner was improperly removed from his position as Special Consultant to the Public Health Service in the Department of Health, Education, and Welfare and that he is entitled to reinstatement upon the ground that his removal was effectuated without due process.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

vs.

OVETA CULP HOBBY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

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INTEREST OF AMICUS

The American Civil Liberties Union is gravely concerned over the alarming extent to which the suppression of basic liberties and the corruption of historic safeguards have replaced legitimate police and judicial procedures required to safeguard the security of the country. We therefore

stand against guilt by association, judgment by accusation, the invasion of the privacy of personal opinions and beliefs and the confusion of dissent with disloyalty—all of which are characteristic of the totalitarian tyrannies we abhor. The abuse by wrongful un-American methods of the rightful national aim to safeguard the security of the country not only betrays the noblest traditions of our history but also impairs the capacity for leadership of free peoples at this crucial time for freedom in the world.

Civil liberties, born of centuries of the people's struggle for dignity and freedom, are a basic part of man's heritage. Freedom of religion, thought, communication, assembly, dissent, freedom from discrimination, and the right to due process of law are highly prized parts of the American heritage.

We are interested in this case because we believe that the "hearing" afforded Petitioner in the administrative proceedings below was a sham hearing only. We believe that the decision of the Court of Appeals below must be reversed for the following reasons:

1) Reliance by the Loyalty Board upon confidential information, the nature, substance and source of which was undisclosed to petitioner, was a denial of due process of law required by the Fifth Amendment to the United States Constitution;

2) Failure to permit petitioner to confront and cross-examine "informants" who supplied adverse information or who testified *in camera* before the Loyalty Board violated that essential fairness which due process demands in administrative proceedings;

3) A continuation of the present procedures is an ever-mounting danger to the national security, requiring a finding that such procedures are violative of due process of law become unreasonable, when the procedures use the secret testimony of the "faceless informer."

INTRODUCTION

The case at bar does not involve the rights of Communist Party members;* it involves the right of an American citizen not to be branded as disloyal by his government without a due process hearing. While we believe that it is important in the interests of the national security to ferret out those who, either intentionally or inadvertently, could endanger our national security in "sensitive positions," a loyalty (or security) program applied to non-sensitive positions presents a danger to our traditions, our freedoms, our security itself.

The issues in this case are the very same as those involved in *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd. by an equally divided Supreme Court, 341 U. S. 918.

The impact of this Court's affirmance of the *Bailey* case on large segments of our economic, political and social life cannot be discounted.

Government employees are not the only ones directly affected, however. Also involved are State and City civil servants,[1] merchant seamen,[2] United States citizens employed as international civil servants,[3] young men inducted

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*In considering the rights of members of the Communist Party, the American Civil Liberties Union recognizes that problems have arisen because of the dual nature of the Communist movement. It is both a political agitational movement and a part of the Soviet conspiracy. Insofar as it is the first, its members have all the rights of members of other parties; to the extent that it is the second, its members may in some particulars be restricted by law. The ACLU has recognized this distinction in positions it has taken in the past with respect to various laws and governmental actions affecting totalitarian movements—Fascist, Ku Klux Klan as well as Communist—and will continue to do so in the future.

[1] *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

[2] Brown & Fassett, "*Security Tests For Maritime Workers: Due Process Under The Port Security Program*," 62 Yale L.J. 1163; *Parker* v. *Lester*, (N.D. Calif., S.D.), 112 F. Supp. 433.

[3] Executive Order No. 10422, 18 Fed. Reg. 239 (1953), as amended by Executive Order No. 10459, 18 Fed. Reg. 3183 (1953).

into the Armed Forces under the Selective Service System,[4] government contractors and their millions of employees,[5] scientists,[6] teachers and professors in our schools and universities,[7] and applicants for admission to various professions.[8]

Indeed, another crisis such as the Korean War, may mean a loyalty-security program for the employees of power plants, steel mills, railroads, or any number of other vital industries. The constitutional issues involved in this proceeding therefore, may affect, in vital measure, the thinking and lives of a vast majority of our citizens.

THE ISSUE

The question before this Court is whether or not an employee holding a non-sensitive, non-policy-making position in a non-sensitive agency of the Federal government is entitled to know the nature, source and substance of the charges against him and an opportunity to confront and cross-examine adverse witnesses, in a proceeding to discharge him from employment on the alleged ground that there is a "reasonable doubt" as to his loyalty.

Inasmuch as the legal and constitutional issues are ably and fully dealt with in petitioner's brief, we believe it unnecessary to burden this court with a repetition of those arguments. Accordingly, our brief will demonstrate the

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[4] Army Regulations: AR 615-370, effective December 6, 1950; S. R. 600-220-1, effective June 18, 1954; Air Force Regulation 35-62, effective March 1, 1954.

[5] Munitions Board, Industrial Security Manual For Safeguarding Classified Security Information, (Dept. Def. 1951); Comment, "*Loyalty and Private Employment: The right of Employers to Discharge Suspected Subversives,*" 62 Yale L.J. 954.

[6] Atomic Energy Act, 60 Stat. 767 (1946), 42 U.S.C., Sec. 1810(b)(5), (B) (ii) (1946); Gelhorn, "*Security, Loyalty and Science,*" Cornell University Press, (New York, 1950).

[7] *Adler* v. *Board of Education*, 342 U. S. 485.

[8] Brown & Fassett, "*Loyalty Tests For Admission To The Bar,*" 20 U. of Chi. L. Rev. 480.

practical effect of the denial of "procedural due process" on those who have been involved in loyalty-security proceedings. We believe that a demonstration of actual instances of proven injustice and false and fantastic accusations against individuals who have been involved in these situations will enable the Court to evaluate the real meaning of the issues posed by this case.

POINT I

Reliance by the Loyalty Board Upon Confidential Information, the Nature, Substance and Source of Which Was Undisclosed to Petitioner, Is a Denial of Due Process of Law.

The Loyalty Board's consideration of secret evidence, the nature, substance and source of which was undisclosed to petitioner in this case is the rule and not the exception in loyalty-security proceedings. Wholly apart from the question of the right to confront and cross-examine adverse witnesses, loyalty and security boards rely to a large measure on so-called "confidential" information which is gathered by the Federal Bureau of Investigation and other investigative agencies in the regular course of their operations.[9]

The case of *"Charles B. Smith"* an important official of the United Nations Secretariat,[10] is an excellent example.

In the *Smith case*, respondent was alleged to have been employed by the now defunct San Francisco School of

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[9] *Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951*, Hearings, subcommittee of the Committee on Appropriations, Senate, 81st Cong., 2nd Sess. (1950), pp. 136-137.

[10] *"Charles B. Smith"*, *Respondent* v. *International Organizations Employees Loyalty Board*, *"Hearing,"* Dec. 14, 1953, New York, N. Y., resulting in a determination on Jan. 26, 1954 of "no reasonable doubt as to the loyalty of [Charles B. Smith] to the Government of the United States." The name "Charles B. Smith" is fictitious. The true name will be supplied to the Clerk of the Court on request.

Social Studies from 1934 to 1940, under the supervision of Alexander Meiklejohn and that:

> "Information has been received by the Commission to the effect that the School of Social Studies at San Francisco, was actively engaged in the promulgation and dissemination of Communist propaganda; that the interrogation of prospective students by this school reflected that this institution was anxious to acquire pupils inclined to Marxist philosophy * * *" (*Charles B. Smith,* Interrogatory No. VII, *International Organization Employees Loyalty Board,* Oct. 9, 1953).

A request for the source of this accusation was refused but after an exhaustive independent investigation by Smith's attorneys, the charge was found to be based on a verified complaint in a law suit commenced in 1938, in the courts of California, entitled *"Ivan Francis Cox* v. *13th District of the Communist Party, et al."* (Complaint No. 278084, San Francisco County, as amended January 20, 1938) wherein it was alleged:

> "That the said sponsors and directors of the said San Francisco School of Social Studies have conspired and confederated together to keep from the public press of the City of San Francisco and the State of California, the true facts surrounding the enunciated purposes and aims of said school, and have otherwise by devious and diverse means attempted to use influence and pressure on several individuals and persons on numerous and sundry occasions with the object and purpose of hiding and concealing the fact that the said San Francisco School of Social Studies is, in reality, a training school for adult organizers of the Communist Party of the United States, and, more particularly the 13th District of said Communist Party, with headquarters at No. 121 Haight Street, San Francisco, California."

In dropping the law suit seven months later, Cox stated, under oath on September 2, 1938, that the suit was instituted in order to "smear" every prominent person in the

State of California, including all the Regents of the University of California, that he had been "duped" by a private detective then "wanted" on a warrant for assault, and the detective's attorney (thereafter censured by the California Bar Association); that he knew nothing about the San Francisco School of Social Studies and was induced to commit perjury by the detective and his lawyer.[11] The law suit was then dismissed by the California courts *with prejudice.*

This was the source of the information that branded the "San Francisco School of Social Studies" as "actively engaged in the promulgation and dissemination of Communist propaganda" when it has been recognized by leading educators as one of our most successful early experiments in adult education and that it had no association with any political or economic group whatsoever (Cf. Powell, *"Education for Maturity,"* Hermitage Press, (New York, 1949)).

The source of the information upon which Interrogatory VII in the Smith case was heard was not disclosed to Mr. "Smith" and was not known to the members of the International Organizations Employees Loyalty Board, even though it could in no way be considered "secret," (*United States* v. *Heine* (2 Cir.) 151 F. 2d 813). Fortunately, it was shown to be a complete fraud and hoax; but what would the result have been, if the source of the Charge had not been discovered by Smith's attorneys? What weight would the Loyalty Board have given to Charge VII, which was part of "all the evidence" upon which the Board was authorized to make a determination?

Not so fortunate was *Robert Fulton Waldeck*,[12] a former medical photographer in a Veterans' Administration Hos-

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[11] *"Duped By 'Red Hunt' Suit, Ivan Cox Charges. Defendants Not Served. Trial Unset. Whole Action Designed Apparently To Smear People He Claims,"* San Francisco "Chronicle", August 29, 1938; San Francisco "Examiner", August 29, 1938.

[12] *Waldeck* v. *Higley, et al,* (U.S.D.C., D.C.) Civil Action No. 4698-1954, now pending.

pital in Memphis, Tennessee. Although this employee had no access to classified material and was not in a policy-making position, he was suspended as a "security risk." Charge 3 of the Statement of Charges against him was:

> ". . . association with persons who were members of or affiliated with the Communist Party during the years 1938 and 1939, through your affiliation with the American Labor Party. The American Labor Party is referred to solely for the purpose of identification as to time, place and circumstances."

The employee asked for the names of the individuals allegedly involved in this allegation but was informed that the charge was "as specific and detailed as security considerations, including the need for the protection of confidential sources of information, permit." The employee testified that the only affiliation he had ever had with the American Labor Party was the fact of registration in New York elections in 1938 and 1939, that he had never attended a meeting of the American Labor Party, and that he had never been a member of the American Labor Party. In addition he submitted an affidavit from a former official of the American Labor Party which stated that the American Labor Party was controlled and dominated by anti-Communist trade-unionists until 1944, long after the employee stopped registering to vote "ALP." On October 7, 1954, the employee was informed that the charge was sustained "on the evidence of record," and that he was dismissed, effective October 12, 1954.

Ira S. "Stone," [13] a former employee of an engineering firm engaged in defense work, was accused, as was his wife, of expressing opinions in favor of Communism and having the reputation of being "pro-Communist." When Mr. Stone's attorneys asked that the Board inform them of the

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[13] Appeal of Ira S. "Stone", Case No. 54-800, now pending before the Appeal Division, Eastern Industrial Personnel Security Board. The name "Stone" is fictitious. The true name will be supplied to the Clerk of the Court on request.

nature and substance of the opinions allegedly expressed "in favor of Communism," and where and when Mr. Stone and his wife acquired a "pro-Communist" reputation, they were informed by the Board "that the disclosure of the requested information is either unauthorized or unnecessary."

The government's failure to disclose the nature, substance and source of secret evidence, wholly apart from the problem of confronting and cross-examining adverse witnesses, has resulted in the following farcial accusations levelled against individuals involved in loyalty-security proceedings:

In one case, an employee was accused of having been on the staff of the "Daily Worker;" investigation disclosed that the staff member of the Daily Worker achieved the same name as the Government employee only by the unfortunate coincidence of marriage (Bontecou, "*The Federal Loyalty-Security Program*," Cornell University Press, New York 1953, p. 83).

The same writer reports that a bachelor was formally accused of having a Communist wife (*supra*, p. 83); while another employee was accused of advocating the overthrow of capitalism by force and violence, an allegation which proved to relate to his socialist views in college days (*supra*, p. 105). Still another employee was challenged because of a letter he had drafted upon the orders of his superior—presumably on the theory that he had performed this duty in the interests of a foreign power (*supra*, p. 106).

Miss Bontecou reports the case of the individual, well known to friends as an active anti-Communist who had opened their eyes to "Party machinations" in labor unions and other organizations, who was accused of placing on his walls, banners emblazoned with the hammer and sicle on which appeared the slogan, "Workers Arise" (*supra*, at p. 113). Still another piece of nonsense, which would be funny were it not so serious, is the case of a man

charged as a Communist because some unidentified informant reported that he had Communist literature in his basement. The literature turned out to be a file of the "New Republic" (Joseph and Stewart Alsop, "*We Don't Want Loyal Numskulls,*" Washington Post, August 22, 1948).

Apart from the *Dorothy Bailey case,* the courts that have considered this issue had before them situations where the employees were employed either in "sensitive" agencies or "sensitive" jobs. Nevertheless, they have uniformly held that either "due process" of law or a statutory requirement necessitates that the employee be informed of the nature, source and complete substance of the derogatory information against him (*United States* v. *Gray,* (9 Cir), 207 F. 2d 237, 241-242; *Deak* v. *Pace,* 88 U. S. App. D. C. 50, 185 F. 2d 997; *Parker* v. *Lester,* (D. Calif.) 112 F. Supp. 433, 444; *Money* v. *Anderson* (denied cross-examination, employee successfully sued accusers for libel; discharge invalidated because charges insufficient to prepare defense, (D. C. Cir.) 208 F. 2d 34; *Manning* v. *Stevens,* (D. C. Cir.) 208 F. 2d 827).

Even under the Selective Service Act, where the issue involved the statutory inquiry of the Justice Department's advisory "auxiliary service" to Draft Boards in conscientious objector cases (cf. Brown & Fassett, "*Security Tests For Maritime Workers: Due Process Under The Port Security Program,*" 62 Yale L.J. 1163, 1194-1195), this Court held that the substance of the derogatory information must be disclosed (*United States* v. *Nugent,* 346 U. S. 1). The late Chief Justice's opinion, noted with approval (346 U. S., p. 6, n. 10), *United States* v. *Bouziden* (D. C. W. D. Okl.) 108 F. Supp. 395, also decided under the Selective Service Act, where the District Court stated (at p. 398):

> "The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hear-

> ing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce."

Indeed, non-disclosure of confidential information in civil cases will be permitted only when it is clear that the safety of the nation will be adversely affected, (*United States* v. *Reynolds*, 345 U. S. 1, 7, 11).[14] And no less an authority on counter-espionage than General William J. Donovan, wartime head of the O.S.S., has stated:

> "While the Board's conclusion on the importance of protecting the investigatory work of the FBI appears justified, it does not follow that a Government employee must therefore be denied opportunity to be informed of the source of the evidence upon which the charges against him are based.
>
> "Certainly in practice much more could be disclosed to the employees than is currently disclosed. There seems no reason why the anonymous informant who is not in the regular employ of the FBI and whose testimony is relied on by the Board should not be revealed to the employee. It seems reasonable also that the Board should have the right to subpoena these informants. If non-confidential informants do not want to stand up and be counted, then their information should be used only as possible leads and not be made the basis of a record which cannot be refuted. And where it is impossible to reveal to the employee the *source* of the evidence against him, as in the case of confidential informants, the employee should at least be fully apprised of the *contents* of the testimony." (Donovan & Jones. "*Program For A Democratic Counter Attack to Communist Penetration Of Government Service*," 58 Yale L. J. 1211, 1234-1235).

Thus, wholly apart from the question of the right to confront and cross-examine adverse witnesses, the Loyalty

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[14] Compare rule on non-disclosure in Criminal cases: *United States* v. *Andolscheck* (2 Cir) 142 F. 2d 503; *United States* v. *Beckman* (2 Cir.) 155 F.2d. 580; *United States* v. *Coplon*, (2 Cir.) 185 F.2d. 629, 638.

Board's consideration of secret evidence, the nature, substance and source of which was unknown to petitioner, was completely unjustified and constituted a flagrant denial of "procedural due process of law."

POINT II

The Failure to Permit Petitioner to Confront and Cross-Examine "Confidential Informants" was a Violation of Procedural Due Process of Law.

Respondents' refusal to permit petitioner (holding a non-sensitive, non-policy-making position in a non-sensitive agency) to confront and cross-examine witnesses who testified against him was the result of the alleged need of preventing restriction of F.B.I. investigations (Donovan & Jones, *"Program For a Democratic Counter Attack to Communist Penetration of Government Service,"* 58 Yale L.J. 1211, 1234). Indeed, the Bureau is not authorized to obtain statements under oath and informants are assured that their identity will not be revealed, (Hoover, *"A Comment On The Article 'Loyalty Among Government Employees'"*, 58 Yale L.J. 401, 404-405).

The consequences of this policy have resulted in the following situations which actually occurred in loyalty-security proceedings:

Employee "A" was charged with being "pro-Russian" in his ideas. At the hearing, the informant who had furnished this information testified that he believed that "A" had "pro-Russian ideas" because he had said that unions were desirable things and that Negroes "were entitled to as much as anyone else," (Bontecou, *"The Federal Loyalty-Security Program," supra*, at pp. 127-130).

Employee "B" was charged with making the statement:

"I prefer the Communist form of government to that which we now have." At the hearing it developed:

> ". . . that the employee had been active in his local civic association and had decided to take some

courses in public speaking to help him in his organizational work. In connection with these activities he did a great deal of telephoning from the agency. When he began his course he discovered that the professor had selected communism as the topic around which the class exercises would center, chiefly because he thought it would be easy for the students to find current material on this subject. During the course the employee had clipped material on communism from the papers and had assembled on his desk relevant books from the department library. The material he gathered contained some of J. Edgar Hoover's strong anti-Communist speeches and statements. The fellow employees had noticed the subject matter of the collection, had understood him to say something on the telephone about 'the Communism we teach,' and had jumped to the conclusion that he was teaching communism to children in night school. This comedy of errors was completely cleared up through the testimony of all the witnesses at the hearing, including the informants. One of them repudiated the signed statement he had given to the FBI and denied that the employee had said, as reported, 'I prefer the Communist form of government to that which we now have.'" (Bontecou, "*The Federal Loyalty-Security Program*", *supra*, at p. 130).

Lloyd McBride",[15] a Navy Department civilian engineer, was accused of a sympathetic association with a woman identified as a former courier for a Soviet spy ring. This woman and McBride had lived in the same large apartment house in Washington, D. C., at about the same time.

On December 8, 1954, a confidential informant who had previously furnished this information to federal investigators testified before the Navy Department's Security Hearing Board *in camera*. The informant testified that McBride and the "former courier" were often together and

[15] Navy Department Security Hearing Board (Bureau of Ships), December 8, 9 and 10, 1954, Washington, D. C. The name "McBride" is fictitious; the true name will be supplied to the Clerk of the Court on request.

appeared to be quite friendly. Thereafter, McBride testified that he had never heard of the "former courier" prior to the receipt of the charges in his case, and from what he had recently learned of her description, had never even seen her. In the meantime, and largely through the efforts of the members of the Hearing Board, Board's Counsel, and the Board's Security Officer, the informant agreed to confront McBride at the hearing, testify in his presence, and be cross-examined by his counsel.

On December 10, 1954, the informant appeared at the hearing and identified herself as the manager of the apartment building in which McBride had resided. She testified, after seeing McBride and identifying him as the young man seated opposite her, that the information given to federal agents and her testimony before the Security Hearing Board *in camera* on December 8, 1954, was erroneous and mistaken; that in fact she had never seen McBride with the "former courier;" that she must have confused him with someone else; and that she knew nothing prejudicial or detrimental about McBride except that he and his roommate had invited Negroes to attend parties in their apartment.

In the case of *John Jones*,[16] a respected government employee with many years service, a co-worker informed the FBI that he had heard Jones express Communist ideas to another employee, and that Jones had told the informant that he was going to join a subversive organization.

At the hearing, on direct examination by members of the Security Hearing Board, it appeared that the only other witness to either of the alleged conversations was a third employee, since deceased, that the informant had never been displeased by anything Jones had done in their work together, and was simply doing his duty as a loyal citizen.

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[16] The name "John Jones" is fictitious. The employee does not wish his or his agency's name to be mentioned in this brief. It therefore cannot be furnished to the Clerk of the Court.

On cross-examination, however, the informant admitted that he could not recall the nature of the pro-Communist ideas expressed by Jones, except that he was positive that they were pro-Communist; that he did not know what Communism was, "except that it is a form of political party which threatens world supremacy and so on and so forth;" that he did not know what the Communist Party "line" in the United States had been from 1933 to 1954 on any issue; e.g., he did not know whether the Communist Party had been opposed to or in favor of the conviction of members of the Socialist Worker's Party in 1941; whether the Communist Party had been opposed to or in favor of the candidacy of Franklin D. Roosevelt for the Presidency in 1936; whether the Communist Party was opposed to or in favor of the United States' entry into World War II, either shortly before or shortly after June, 1941; and in answer to the question of Jones' counsel: "As a matter of fact, you don't know anything about Communism at all, do you?, the informant answered: "Except what I read in the newspapers."

The informant further testified that the subversive organization Jones had told him he was going to join was *Americans For Democratic Action*, and that an attorney-friend of the informant had told him that *Americans For Democratic Action* was "as Communist as Russia itself." Towards the close of the cross-examination, (after it had been developed that the informant had at one time been Jones' supervisor and that thereafter, Jones had advanced rapidly in grade, becoming the informant's supervisor), the informant admitted that on several occasions Jones had taken credit for the informant's work.

With respect to a similar situation, the Joint Committee on Atomic Energy has stated:

> "Case A serves as a warning that an informant may perhaps give the FBI highly unfavorable advice but when placed under oath before a local board deny all that he had said, admit that he knows little or nothing about the employee and admit further that he bore him

a grudge" (Report, *Investigation of U. S. Atomic Energy Commission*, 81st Cong., 1st Sess., (1949) at p. 68).

In the well-publicized *Chasanow case*,[17] the Navy Department, in an unprecedented and extremely commendable manner, reversed the "security risk" discharge of a career employee with 23 years service. The Navy Department's action occurred, however, only after the press had reported some of the fantastic happenings which resulted in Chasanow's dismissal. For example, on April 20, 1954, Anthony Lewis, feature writer for the Washington Daily News, reported in an article entitled "Gumshoes in Greenbelt":

> "George J. Panagoulis, police chief of Greenbelt and a graduate of the FBI school, was also visited by two ONI men.
>
> 'They had been all over Greenbelt,' he said. 'Their roamings, themselves, originated rumors. On the basis of my training and experience in investigative methods, I personally considered those two fellows to be rank amateurs in the field of security investigations.'
>
> "Several of the Greenbelt residents who are standing by Mr. Chasanow have made the serious charge that the ONI men tried to force one kind of testimony from them—testimony unfavorable to Mr. Chasanow.
>
> "'In their conversation they threw out various names,' said Charles T. McDonald, Greenbelt city manager, 'endeavoring to get me to verify that I had knowledge of Mr. Chasanow's close association with these people, I had no such knowledge.
>
> "'I explained thoroughly to them that Mr. Chasanow was an active interested citizen . . . The agents left somewhat disturbed that I had not given them the answers they had wanted.'"

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[17] Cf. Lewis, writing in the *Washington Daily News:*

"An Outcry from Greenbelt", April 15, 1954; "The Ordeal of Abraham Chasanow", April 16, 1954; "Inconsistencies and Ironies", April 19, 1954; "Gumshoes in Greenbelt", April 20, 1954; "Trouble in Greenbelt", April 21, 1954; "The Chasanows Look Ahead", April 22, 1954; "Chasanow Cleared and Returned to Job", September 1, 1954; "A Friend Brought Champagne", September 2, 1954.

"Mrs. McCamy said:

" 'They kept trying to put words in my mouth about a radical group at Greenbelt . . .' "

"Mrs. McCamy and Anthony Madden, another Greenbelt resident, were called to Mr. Chasanow's security hearing by the Navy. There the Navy representative, a Wave, asked them about the statements they had given the ONI, and both found—they said—that they had been completely misquoted by the ONI.

"This is Mr. Madden's account:

" 'Two ONI agents (had) asked me if Abe knew people whom they named, and I said that, Greenbelt being a small town, he undoubtedly knew most of them, just as I and practically everybody else in Greenbelt did.

" 'They asked me if he was friendly or associated with certain people they named who apparently were under suspicion. I said he was a very high type of person and friendly but associated only with the finest type of people in town.

" 'That is why I was surprised at the hearing when the Wave lieutenant said something to the effect that I was reported as having told the investigators that he associated wih some people who were under suspicion. I corrected this as a misunderstanding . . .' "

"Mrs. McCamy said the ONI men asked her about a great number of persons, including Mr. Chasanow. She said she answered that she didn't like many of them, though she knew nothing about their loyalty, but that in any case she 'wouldn't mention Abe Chasanow in the same breath with them'—she thought so highly of him.

" 'I found at the hearing I had been misquoted about Abe and another man,' she said. 'I told the board I had a dislike for the man over the sale of my house but had certainly not called him a communist or anything. That's why I was surprised—I hadn't said it.' "

As a result of this and other disclosures, the Navy Department re-investigated the case, and on September 1, 54, Chasanow was returned to work by the Navy Department with a public apology. Mr. Lewis, writing in the

Washington Daily News on that day, reported the following:

> "* * * Assistant Secretary of the Navy James H. Smith Jr., at a press conference attended also by Mr. Chasanow, said the case already has resulted in some changes of procedure in the Navy security program and further action is being contemplated. * * *
>
> "He said the case revealed the following flaws in the security program procedure: * * *
>
> "Anonymous informants, who made derogatory statements about Mr. Chasanow originally, failed to back up their charges when questioned about them.
>
> "Mr. Smith put greatest emphasis on this problem of anonymous accusers.
>
> "He said he is now 'looking into ways and means of preventing delivery of evidence which people are unwilling to stand up and back.'
>
> "He said he personally would favor requiring all such derogatory statements to be given under oath. (General Government policy on security matters bars such a procedure, however.)
>
> "Town leaders also said Navy investigators tried to force them to make unfavorable statements about Mr. Chasanow and then falsely reported the friendly comments they actually made.
>
> "When the anonymous informants were requisitioned, Mr. Smith said, their new statements made only two conclusions possible—they had changed their minds since the first interview or the original investigators had not reported their statements correctly.
>
> "Mr. Smith said he will look into the possibility of tking some punitive action against either the informants or the investigators. * * *"

In the *Waldeck case*,[18] the employee asked the Veterans Administration for a hearing in the New York City area, his home, inasmuch as his witnesses were unable to travel to the Veterans Administration Hospital at Memphis, Tennessee, the place originally scheduled for the hearing. The request for the change of venue was denied on the ground

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[18] See note 12, *supra*.

hat numerous witnesses for the government in the Mem-his area (all or most of them employees or former em-loyees of the Veterans Administration Hospital), had sig-ified an intention to testify at the hearing. When the mployee requested that the Board reconvene in New York ity after taking the testimony of the government witnesses n Memphis, in order to hear the employee's witnesses who esided in New York, the employee was informed that this rocedure was not authorized and his request denied.

The employee and his counsel then travelled to Memphis, ennessee. Immediately after the hearing commenced, the mployee was informed that he would not be permitted to onfront or cross-examine any witness, nor be informed of heir identities (although he knew who some of them were), ven though the agency regulations specifically provided hat the Hearing Board inform the employee of his right o cross-examine any witness offered in support of the harges and that the employee or his counsel would be ermitted to cross-examine all witnesses. The reason given or this action was that while each witness had stated that e would be happy to testify against the employee in pri-ate, all of them had informed the Board that they did not "desire" to testify in the employee's presence or be cross-examined by his counsel.

The Board justified its action by interpreting the Veter-ans Administration regulations (which provided that the mployee be informed of his right "to cross-examine any witness offered in support of the charges" and that "reason-able cross-examination of witnesses by the employee or his ounsel would be permitted"), to mean that the employee or his counsel was entitled to cross-examine only those "witnesses who appeared before the Board in his presence."

Thus, an employee who had been suspended from his job without pay, travelled from New York to Memphis, Ten-nessee, in the sole hope of proving that his continued em-ployment was no risk to the national security through the cross-examination of adverse witnesses, one of whom he

believed was a psycopathic liar, only to find that since no adverse witnesses "desired" to be cross-examined by his counsel, all he could do was deny under oath the charges against him.

In another case reported by the American Civil Liberties Union of Northern California in its September, 1954 issue of "American Civil Liberties Union—News", the following appears (pp. 1, 4);

> "Last month, a favorable decision was handed down in an extraordinary Atomic Energy Commission security case in which the Union had intervened. The case is of special interest because it reveals what prompted an informer to report the employee, a young scientist at the University of California Radiation Laboratory, to the FBI.
>
> "The informer is a school teacher and former clergyman. His connection with the case was disclosed when the employee sought to have him furnish an affidavit that he had no Communist sympathies and was not a security risk. The informer not only supplied the affidavit but, in doing so, revealed that it was he who had gone to the FBI with charges against the employee.
>
> *The Charges*
>
> "Those charges read as follows: It was reported that you have advocated the supremacy of Communism over Democracy as known in the United States; that you have damned the weaknesses of the United States and radically upheld the virtues of Communism. It was further reported that you have stated that the trouble with Americans is that they believe all the lies told against Russia; and that Russia is really a progressive, peace-loving nation.
>
> "A further charge was that the employee's wife had sought to telephone her father in Yugoslavia, on the occasion of her birthday. Also, during the course of the hearing the following charge was added: It has been reported that you are prone to make wild statements, and to express extreme views in order to

"show off", and that you reveal immaturity and instability in your talk and conduct.

"When counsel asked the Board to furnish him with the 'wild statements' that the employee had made, it was pointed out that the added charge merely asserted that the employee was 'prone' to make wild statements.

Informer Questioned by Board

"The Union sought unsuccessfully to induce the informer to testify at the hearing, but he declined to do so, and counsel reported the conversation to the security board. At a subsequent hearing, the informer appeared at the invitation of the AEC, but the employee and his counsel were not only denied the right of cross-examination but contrary to the regulations, they were not allowed to be present when the informer was examined.

The favorable decision was handed down about six months after the hearing in the case. However, because of the report made by the informer, it took about 2½ years before the employee was granted a clearance that permits him access to classified military information.

The Informer's Testimony

"A substantial part of the informer's testimony before the board follows:

* * *

A. * * * The only association of ideas there in my mind, and the thing that made me call up the FBI, very plainly speaking, and tell them I wished they would look into the matter, was the fact that at that time some men were working up there and were being questioned, or brought before the public press as stealing atomic secrets. I didn't want, S——, or any of those youngsters, to get involved in that kind of stuff.

I have been counseling youth since 1921.

* * *

A. When I came back down—this was a year ago last summer—when I came back down to Berkeley I just insisted that S—— sit down and talk the thing over, and face the facts, as I did a week or ten days ago, and we went into the matter of what he had said and done, and I admitted with him there was nothing subversive, or anything that would in any way impugn his integrity, but I thought he made a fool of himself. He said he thought so, too.

This is secret because, as a counselor of youth I am telling you something I wouldn't divulge to anyone else.

Q. Yes, this is confidential.

A. I said, "S——, the fact that you are willing to admit and face the fact that you talk like an academic youngster in college, instead of a mature young man, is a good thing and I accept that as full clearance as far as I am concerned of the character that I believed you had."

"Clean As A Hound's Tooth"

I told him in plain English that I had always trusted him. I knew him well and I was willing to come before this Committee and tell them, as far as his character was concerned, he was absolutely clean as a hound's tooth, and that there was not a thing that I would report, or could say that would in any way be detrimental to him. In fact this one characteristic of him being a loquacious youngster, listening to a lot of other people, and talking of generalities about the values of Russia, and Russian life, and Russian conduct, and some of our own weaknesses, did not involve or characterize him as in any way favorable to Communistic government or ideas.

I asked him if he belonged, years ago, to any group of Communists, and he said "No." I asked his friends about it. I asked a young lady with whom he went for a while, if she had found out anything in that regard, and she said it was her belief that R——, as we called him, had no affiliations with any Communistic group whatsoever."

In the 1951 case of Mary Black[19], the following charge was made to her: "You have been and still may be a member of, affiliated with, or sympathetically associated with the Communist Party, Communist Political Association, Communist Party, U.S.A., and the Socialist Workers Party." It was further specified that she had attended an open Socialist Workers Party meeting; had encouraged, approved, condoned, and defended her husband's activities on behalf of that Party; had closely associated with Communists and their sympathizers and had approved of their views and activities; had received Communist aid in getting position; had possessed and read with approval the literature of the Communist Party and the Socialist Workers Party.[20] The Veterans Administration voluntarily asked the only witness who had supplied this information to appear and testify. The following testimony of said witness appears in the Transcript of Hearing (P. 106, Veteran's Administration Loyalty Board, Cleveland, Ohio, July 16, 1951):

> "Q. In the time that you have known (Mary Black), you have never heard her say anything, nor seen her do anything, that would lead you to doubt her loyalty?
> "A. Never."

It further developed that the witness had had conversations totalling six hours with Mary Black in all his life.

Mary Black was cleared.

Perhaps the most striking illustration for the desperate needs for confrontation and cross-examination in these cases is to be found in the *"Smith" proceeding.*[21] In that case, "Smith" was charged, among other things, with having attended Communist Party meetings in 1935 and 1939.

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[19] The name Mary Black is fictitious; the true name will be reported to the Clerk of the Court on request.

[20] It should be noted in passing that the Communist Party and the Socialist Workers Party are bitter foes.

[21] See note 10, *supra.*

Inasmuch as counsel had already shown through documentary evidence that the other charges were false or irrelevant, the Hearing Board, displaying an extreme sense of fairness, attempted to secure permission from the FBI to release the informant's name in order to give Smith an opportunity to refute the accusation beyond mere denials. Two days before the hearing, Smith's counsel was informed tht the informant's name was Captain Charles G. Bakesy, and that the alleged Communist Party meeting in 1935 took place in Carmel, California, at the home of Ella Winter, then the wife of Lincoln Steffens.

During the hearing, the Board Chairman informed "Smith" that Bakesy, on a re-check by the FBI, had withdrawn the accusation that Smith had attended a Communist Party meeting in 1939, but affirmed his prior charge that Smith had attended a meeting in 1935 at the home of Ella Winter. The Board Chairman then asked Smith why Bakesy would make such a statement if it were not true. At this point, Smith's counsel asked the Chairman if he knew that Bakesy was a perjurer. When the Chairman said that he did not, and asked counsel if he had such information, counsel asked leave to ascertain what the facts were, and an opportunity to submit evidence on this issue was granted.

Four days later, documentary evidence was submitted that Captain Charles G. Bakesy was a professional witness[22] whose testimony on other occasions had been repeatedly and publicly rejected by government officials as incredible and unworthy of belief. Bakesy, who had offered to testify for a fee against Harry Bridges in the 1939 Bridges' deportation proceedings and whose offer had been refused by the West Coast Immigration Director, turned up at the hearing as a defense witness *for* Bridges. Dean Landis, the trial examiner in the Bridges case stated at p. 74 of

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[22] "San Francisco Examiner", August 18, 1939; "San Francisco Chronicle", August 18, 1939; Cf. Bailey, "*A Story Book Detective Takes the Stand*," San Francisco Examiner, August 18, 1939.

the "Findings And Conclusions Of The Trial Examiner," (a government document printed by the United States Printing Office):

> "Bakesy testified to other matters also, but his testimony need not be reviewed. Bakesy failed to carry conviction to the examiner. It is impossible to separate truth from fiction in his testimony. It was bizarre and at times fantastic. It seems best not to permit the testimony of either Captain or Mrs. Bakesy to play a real part in reaching such ultimate conclusions as must be reached in connection with the matters that are at issue in this proceeding."

If we assume, for the sake of argument only, that Captain Bakesy was one of the unidentified informants who testified in secret before the Loyalty Board in Petitioner's hearing in the case at bar, the absence of cross-examination and an opportunity to rebut a fantastic accusation made by him against Petitioner resulted in an incredible miscarriage of justice, completely abhorrent to every one of our traditional concepts of "fair-play." For all Petitioner knows, Captain Bakesy or someone just like him, either testified against him or otherwise supplied the information which resulted in the Loyalty Board's determination that Petitioner was disloyal.

The occasions in judicial history, even in systems in which hearsay evidence is permitted, where this sort of material has been considered as "evidence," are remembered today only as examples of the perversion of the principles of justice (cf. Pierre Dreyfus, "*The Dreyfus Case*," (Yale University Press, 1937 p. 26); *United States* v. *Joseph Alstoetter, et al*, Vol. III, War Crimes at Nuremberg ("The Justice Case") printed by the Government Printing Office, p. 1024).

This then, is the sorry record resulting from the alleged need of preventing restriction of FBI investigations; the justification being the "national security interest" involved in keeping the identity of confidential informants secret.

We respectfully submit that in the case of the employee holding a "non-sensitive," "non-policy making" position, there is neither necessity nor justification for withholding one iota of confidential information, or for refusing the employee the right to cross-examine each and every adverse witness. If the government would be embarrassed by such disclosure, the charge on which it is based should be withdrawn[23]—in the "non-sensitive" positions there is no need to tolerate an obliteration of the Constitution and the essence of fair procedures.

In "sensitive" jobs, which involve either access to classified material or other information important to national defense and foreign relations, or in "policy-making" positions in these areas, the professional or "under-cover" informant should be separated "from neighbors, maiden-aunts, and casual busybodies who have no legitim te reason for secrecy."[24] If it be claimed in answer to this simple solution that the private citizen would then be unwilling to supply testimony important to the safety of the nation, Congress has ample authority to give loyalty-security boards the power of *subpoena*.

Poorly drawn, slip-shod and politically expedient loyalty-security regulations do not sit well in answer to the documented claim that the fundamental liberties of so many people are fast becoming as extinct as the bison.

POINT III

The "Interests of National Security" Require a Reversal of the Decision Below.

Respondents assert that the interests of national security require this Court to affirm the decision below. While "Security is like liberty in that many are the crimes committed in its name," (Jackson, J. dissenting in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, at

---

[23] Cf. *United States* v. *Coplon* (2 Cir.) 185 F. 2d 629.

[24] Lewis, *Our Security Procedures Need Not Be Unfair*, "The Reporter," November 4, 1954, at p. 23.

p. 551), we respectfully submit that "it requires" this Court to reverse the decision below.

The issue before this Court is whether a federal employee in a non-sensitive job who is faced with a dismissal on loyalty (or security) grounds is entitled to procedural fairness, for it is in the web of the Board's procedures that our traditional liberties are being strangled. Indeed, some measure of the fairness of these procedures may be seen from the fact that of the 7,000 employees who have recently been separated from federal employment on "security" grounds, two out of every three resigned rather than contest the charges.[25]

The procedures of the present loyalty-security program, apart from imposing orthodoxy, stiffling expression and intellectual curiosity, have:

1. Disrupted and delayed the essential work of scientists in the field of secret research vital to the national defense.[26]

2. Caused scientists, engineers and technicians to go into unclassified and non-secret work, when there is a vital need for trained men in this field.[27]

3. Severely impaired federal employee morale and caused many responsible federal officials to resign in order to

---

[25] (*New York Times* Oct. 17, 1954, p. 4E; *Cf.* Goldbloom, "*American Security and Freedom,*" a study sponsored by the American Jewish Committee, New York, 1954, p. 39; Hurst, "*How to be a Security Risk*", "The Humanist", No. 4, (1953), at pp. 172-186).

[26] Brief of *Amicus Curiae, Engineers and Scientists of America,* pp. 9-12; "*Report on the Ft. Monmouth Security Investigations, August, 1953—April, 1954,*" sponsored by the Federation of American Scientists, April 25, 1954, pp. 5-1 to 5-14.

[27] Gellhorn, "*Security, Loyalty and Science,*" Cornell University Press, (New York, 1950), pp. 55-62, 203-224; Gellhorn, "*Security, Secrecy and the Advancement of Science*" in "*Civil Liberties under Attack,* University of Pennsylvania Press, (Philadelphia, 1951), pp. 85-106).

seek private employment.[28] As expressed by George Kennan, former counselor to the State Department: " 'The atmosphere of public life in Washington does not have to deteriorate much further to produce a situation in which very few of our more quiet and sensitive and gifted people will be able to continue in government . . . the margin of safety with which our country moves today is not great enough to permit us to be reckless and wasteful with the talents and the idealism of those people we depend on for the generalship of our peacetime battles.' " (quoted in Barth *"The Loyalty of Free Men,"* Viking Press (New York, 1950), (Cardinal Ed.), p. 19).

4. Denuded the federal civil service of courageous and independent men, willing to question policy laid down from the top.[29]

5. Discouraged our best talents and minds from entering government service in the first place.[30]

With fair procedures, government employees need no longer fear the faceless accuser, the fantastic allegation, the charge to which one can give no answer except to state under oath that it is not so. With fair procedures, perhaps our most able minds and talents will not hesitate to undertake important and vital jobs upon which our very survival may depend. If the existing loyalty-security procedures do not present a greater risk to the "national security" than the alleged need for protecting confidential informers, we respectfully submit that the term has lost its meaning (cf. Barth, *"The Loyalty of Free Men," Viking Press,* (New York, 1950), (Cardinal Ed.) pp. 130-134).

---

[28] *"The Federal Government Service,"* Sixth American Assembly, Arden House (1954), pp. 129-130.

[29] Commager, *"Freedom, Loyalty, Dissent"*, Oxford University Press, (New York, 1954), pp. 15, 19.

[30] Emerson and Helfeld, *"Loyalty Among Government Employees,"* 58 Yale L. J. 1, at p. 142; Barth *"The Loyalty of Free Men," Viking Press,* (New York, 1950), (Cardinal Ed.) p. 133).

Five veteran diplomats have stated our position with amazing clarity.

> "Recently the Foreign Service has been subjected to a series of attacks from outside sources which have questioned the loyalty and the moral standards of its members. With rare exceptions the justification for these attacks has been so flimsy as to have no standing in a court of law or in the mind of any individual capable of differentiating repeated accusation from even a reasonable presumption of guilt. Nevertheless these attacks have had sinister results.
>
> "The conclusion has become inescapable, for instance, that a Foreign Service officer who reports on persons and events to the very best of his ability and who makes recommendations which at the time he conscientiously believes to be in the interest of the United States may subsequently find his loyalty and integrity challenged and may even be forced out of the service and discredited forever as a private citizen after many years of distinguished service. A premium therefore has been put upon reporting and upon recommendations which are ambigiously stated or so cautiously set forth as to be deceiving.
>
> "When any such tendency begins its insidious work it is not long before accuracy and initiative have been sacrified to acceptability and conformity. *The ultimate result is a threat to national security.*" (Norman Armour, Robert Woods Bliss, Joseph C. Grew, William Phillips, and G. Howland Shaw, *Letter to the "New York Times,"* January 17, 1954). (Emphasis supplied.)

"National security" is not a prop which may support the government's case. Rather it is the test which demands that loyalty-security procedures be fair in order that our public servants be permitted to serve the Nation with freedom from fear; not only "from the innocently mistaken in-

former, but also [from] a malicious or demented one" as well.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, *et al.*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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IN THE

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JOHN P. PETERS, *Petitioner,*

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OVETA CULP HOBBY, *et al.*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

THE INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

The Congress of Industrial Organizations (CIO) is a federation of labor unions, whose combined membership approximates six million. It is dedicated to the defeat of Communism through democratic processes.

A substantial portion of these members hold jobs that are covered by one or another of the government loyalty or security programs. Some are civilian employees of departments and agencies of the federal government, and are subject to the "Employees' Security Program," which is the Eisenhower Administration successor to the Truman Administration "loyalty" program involved in this case. A somewhat larger number of CIO members, running into the tens of thousands, are subject to the "Port Security Program" administered by the United States Coast Guard.

Still other tens of thousands, employed by private firms under contract with the Atomic Energy Commission, are subject to the personnel security clearance program of that agency.

An even larger number of CIO members, totaling some hundreds of thousands, are employed by private firms doing defense work under government contracts, and are subject to the security clearance program for such employees operated by the three defense departments of the federal government. Further, Attorney General Brownell has asked Congress to authorize the extension of this or a similar program to private industrial facilities which are important to national defense, but do not have direct contractual relations with the government. These facilities would, in the discretion of the Secretary of Defense, include not only utilities, such as telephones, railroads, and power plants, but also mines, mills and factories. If the Administration secures this requested legislation, virtually all CIO members—and the major portion of the industrial workers of the country—could be brought under some government loyalty-security program.

Finally, a small number of CIO members are subject to the loyalty-security programs of States or municipalities, or to those for military personnel administered by the military departments.

(Loyalty-security programs run by private industry without governmental intervention or participation are becoming more and more widespread, but we have ignored them in this Brief as presenting different legal issues from those raised by government loyalty-security programs.)

The CIO, as a labor organization, is directly concerned that the jobs and job opportunities of the members of its affiliated unions be not placed at hazard through procedures which are not consonant with the guarantees of the United States Constitution. Beyond that, we believe that these government loyalty-security programs, relying

as they do upon the statements of informers whose identity is kept secret from the accused and often from the adjudicating boards, pose a major threat to the constitutional liberties of all Americans, and to the very existence of our democratic system of government.

ARGUMENT

The CIO believes that no one can constitutionally be deprived of employment, pursuant to governmental action, where the deprivation of employment carries with it the stigma of disloyalty or of characterization as a security risk, except after a fair opportunity to rebut the adverse loyalty-security charges at a hearing. Where these charges are based on statements to an intelligence agency by secret informers unavailable for cross-examination, and whose identity is often not disclosed even to the board members, there is no such fair opportunity and the purported hearing is a travesty on our democratic processes.[1]

It is not our purpose to intrude upon the Court's time with legal arguments already made by petitioner and

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[1] We believe this to be an *a fortiori* case after *Wieman* v. *Updegraff*, 344 U.S. 183. There this Court unanimously struck down the action of the State of Oklahoma in requiring school teachers to swear that they were not, and had not within the past five years been, members of any organization on the Attorney General's "subversive" list. The Court based its decision on the principle that "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power" and "offends due process" (at p. 191).

Far worse than classifying the innocent with the knowing is finding the innocent to be guilty on the basis of a sham hearing. We refer this Court to a pamphlet recently issued by the Denver Post, entitled "Faceless Informers And Our Schools," setting forth a number of cases in which school teachers were discharged on the basis of FBI reports to school officials based on statements of secret informants unknown to the teachers in question who steadfastly maintained their innocence. These teachers, unlike those in the *Wieman* case, were actually held guilty and discharged, not just placed in the same classification with guilty persons. We have supplied the Supreme Court Library with a copy of this pamphlet in case it should be requested by any of the members of the Court.

amici curiae. We do, however, believe that the Court should have available information as to the tremendous growth of loyalty-security programs and their ever-increasing spread to all parts of the country and virtually all walks of life.

We recognize, of course, that this Court will adjudicate in the present case only the actual controversy before it, which arises under the old Truman "loyalty" program. We believe, however, that for two reasons this Court should have before it, when it decides that controversy, adequate information as to the general nature and scope of the various government loyalty-security programs now in operation in this country.

In the first place, the Court's decision and, not less, its opinion, will inevitably carry implications as to the constitutionality of these other loyalty-security programs.

In the second place, and far more significantly, the scope of the loyalty-security programs throughout the nation bears directly upon the basic question presented in the case at bar. In the final analysis, what this Court is being called upon to do in this case is to balance two great national interests. On the one hand is the interest in the protection of government (federal, state and local), defense plants, port facilities, armed forces and international organizations against disloyal persons and security risks. On the other hand is the interest in the protection of the individual against loss of employment and reputation on the basis of statements of secret informers whom he never knows and never confronts. Certainly the extent of these loyalty-security programs and the injustices done in individual cases is relevant to this question of balancing great national interests.[2]

---

[2] It had been our intention to set forth a portion of the great many cases that have come to our attention showing the injustices occurring through secret information given by unknown persons unavailable for cross-examination. In view of the excellent presentation of the Amer-

The Government itself presented this point to the Court in *Bailey* v. *Richardson*, 341 U.S. 918. At page 76 of the brief filed by the Solicitor General, the Government stated:

> "The harm to the individual must be weighed against the harm to the public. The problem is one of 'balancing the conflicting individual and national interests involved.' *American Communications Assn.* v. *Douds, supra*, p. 410. . . . disloyalty in the Government service under present circumstances is a matter of great public concern. And it was the informed judgment of the President and those charged by him with administering the loyalty program that in many instances disclosure of the identity of informants, and of investigative techniques and sources of information, would be strongly against the public interest."

We share the Government's belief that the issue in the *Bailey* case, as it is here, was one of weighing the harm to the individual against the harm to the public, of balancing individual liberty and national security. If only a few persons in highly sensitive positions were being subjected to the ravages of secret informants, one might conclude that the balance of national interest lay with the President's judgment that the security of the nation required the protection of these secret informants.[3] Now, however, that these loyalty-security programs with their secret informants, have spread to many millions of persons most of whose employment has no relation whatever to our

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ican Civil Liberties Union on this point, however, and our desire not to duplicate other material before the Court, we are limiting this brief to the general nature and scope of the various loyalty-security programs without reference to the individual cases where injustices have occurred.

[3] Of course, even here, the distinction might well be drawn between different categories of secret informants. An undercover agent of the FBI, for example, might be protected under many circumstances when the landlord, the school associate or village gossip ought not be protected.

national security, the balance of interest may and, in our opinion does, lie with the individual's right to an opportunity to rebut the charges against him before losing his employment and his reputation.

Therefore, in the discussion which follows, we undertake to supply the Court with a description of the general nature and scope of the various governmental loyalty-security programs in operation throughout the country.

The loyalty programs fall into two categories: those operated by the federal government and those operated by States or localities. We discuss them in that order.

I—FEDERAL LOYALTY-SECURITY PROGRAMS

As already indicated, *supra*, pp. 1-3, there are currently in operation five different federal loyalty programs, which apply to different groups of federal employees or to persons in private employment. The Fund for the Republic, Inc., has recently had prepared a survey of these programs, by Sandra Weinstein under the direction of Professor Ralph S. Brown, Jr., of the Yale Law School. With the permission of The Fund for the Republic, Inc., we have printed this study, entitled "Personnel Security Program of the Federal Government," as an Appendix to this Brief. It includes a description of the appropriate statutes, executive orders, and regulations.

While the five different federal loyalty-security programs differ in many respects, the most striking and relevant similarity among their procedures is the use by all of the different boards of investigative agency files containing statements by secret informers. These files are not shown to the accused and the identity of the informers is not disclosed to them. Usually, the identity of the informers is not known even to the members of the various boards. In the investigative files furnished to these boards the informers are identified only by symbol, such as T-1, T-2.

This practice of utilizing the unsworn statements of secret informers was permitted by the original Executive

Order 9835, creating the Truman loyalty program, which provided that

> "the investigative agency may refuse to disclose the names of confidential informants" (Part IV, section 2).

This decision was apparently taken because of the position of the Federal Bureau of Investigation that

> "practically none of the evidential sources available will continue to be available to the Bureau if secrecy and confidence cannot at all times be maintained with respect to the original source of information * * *" (See statement of the Chairman of the Loyalty Review Board, quoted in the Government's brief in the *Bailey* case at pp. 107, 108).

In view of the position taken by the Bureau and presumably by the other investigative agencies, the other loyalty-security programs have followed the provisions and practices under the original Truman loyalty program. Thus the Sample Regulations attached to Executive Order 10450 setting up the Eisenhower security program provide, *inter alia*, that

> "the Board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession."

In the case at bar, arising under the original Truman loyalty program, the pleadings make clear, and indeed the government in its answer alleges,

> "that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to the plaintiff; that the identity of one or more such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath" (R. 20).

We respectfully refer the Court to the Fund study

printed in the Appendix (hereafter designated as App.) for a detailed description of each of the five different federal loyalty-security programs. This Brief will be restricted to pointing out certain features of each of these programs which, we believe, will be of assistance to the Court in understanding their general significance and scope.

A. The Current "Employees' Security Program" for Civilian Employees of the Federal Government

The program which is now in operation for civilian employees of departments and agencies of the federal government is called the "Employee's Security Program." It was instituted by Executive Order 10450, of April 27, 1953, and applies to civilian employees of all of the departments and agencies of the federal government, including the military departments. In 1953 the civilian employees of the federal government totaled 2,302,932 (App. 29).

1. Genesis of the Present Program

The "Employees' Security Program" is an outgrowth of various earlier programs, including the loyalty program established by Executive Order 9835, of March 21, 1947, which is involved in this particular case. It is believed that a brief relation of this history will throw light on the nature of both of these programs. The history and operation of the various federal loyalty and security programs, up until 1952, is fully detailed in Bontecou, *The Federal Loyalty-Security Program* (Cornell, 1953), and the following summary is largely derived from that source.

a. *The Truman administration loyalty program.* In 1939 the Hatch Act was amended to forbid any federal employee

> "to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." (53 Stat. 1148, 5 U.S.C. § 118j)

Sporadic attempts at enforcing this provision were made during the next few years by the Civil Service Commission, by the FBI, and by various of the employing agencies. See Bontecou, pp. 14-21. The Civil Service Commission, in particular, developed regular procedures for hearings and appeals within the Commission. (Bontecou, pp. 14-15.)

The first formal, over-all, systematic program for scrutinizing and adjudicating the loyalty of federal employees was, however, established by Executive Order 9835, 12 Fed. Reg. 1935. The details of this program are set forth in the Petitioner's Brief, and, in greater detail, in Miss Bontecou's book.

We call particular attention to the following features of this program:

(1) The Executive Order cited, as authority for its issuance, the Civil Service Act of 1883, 22 Stat. 403, as amended (without referring to any particular provision thereof); Section 9A of the Hatch Act (viz., the 1939 Amendment); and the authority vested in the President by the Constitution.

(2) The Order, as originally issued, provided that "the standard" for removal from employment

> " * * * on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Bontecou, p. 280.)

Subsequently, by Executive Order 10241, 16 Fed. Reg. 369, issued April 28, 1951 (Bontecou, pp. 281-2), the final clause of this provision was amended to read

> "there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The present case arose after this amendment.

The Order then went on to list six categories of "activities and associations * * * which may be considered in connection with the determination of disloyalty * * *."

These categories were not changed with the amendment of the "standard."

(3) The Order itself set forth certain "loyalty determination procedures," which "shall be considered as providing minimum requirements." In addition it directed the head of each department to "prescribe regulations for the conduct of the proceedings before such [loyalty] boards."

b. *Summary dismissal statutes and "security."* Beginning in 1940, the year after the Hatch Act Amendment which eventually supplied the principal legal basis for Executive Order 9835, the military departments secured the enactment of statutes permitting the summary dismissal of their employees, in the interest of national security. See Bontecou, pp. 12-13. Typical of these statutes was the 1942 Act, 56 Stat. 1053 (quoted in Bontecou, pp. 289-290), which authorized the immediate removal of any employees of the War or Navy Departments or of the Coast Guard

> "whose immediate removal is, in the opinion of the Secretary concerned, warranted by the demands of national security * * *."

Whatever may have been the intention of Congress, the War Department did not interpret these statutes as according the employee the right to a hearing of any sort. Bontecou, pp. 13-14.

These earlier summary dismissal statutes were superseded by the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. § 22-1 (set out in Bontecou, pp. 290-292). This statute authorizes the head of each of certain designated agencies[4] to dismiss civilian employees "in his absolute discretion

---

[4] The Departments of State, Commerce, Justice, and Treasury (with respect to the Coast Guard), the Defense Department and its component parts (Army, Navy and Air Force), the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics.

and when deemed necessary in the interests of national security." The statute provides that the President may extend it to departments other than the ones named in it if he deems it necessary in the interest of national security.

This statute further provides that permanent employees, or those holding indefinite appointments who have completed their trial period, and who are citizens, and whose employment is suspended under the Act, shall, after the suspension but before employment is terminated, be accorded certain procedural rights, as follows: (1) a written statement "of the charges against him" within 30 days after the suspension "which shall be stated as specifically as security considerations permit"; (2) an opportunity to answer the charges and to submit affidavits; (3) "a hearing, at the employee's request, by a duly constituted agency authority for this purpose"; (4) a review of the case by the agency head, or his designee, before any final decision adverse to the employee; and (5) "a written statement of the decision of the agency head."

c. *Merger of the Truman administration loyalty and summary dismissal (security) programs.* It will be noted that the procedures prescribed by the Act of August 26, 1950, are approximately the same as the loyalty program procedures established by Executive Order 9835.[5] The removal standard set out in the August 26, 1950, Act, viz., "in the interest of national security," does however differ somewhat from those successively promulgated for the loyalty program in Executive Orders 9835 and 10241.

Executive Order 9835 provided, in Part VI, paragraph 3, that it was not applicable to persons removed under the summary removal statutes. Nevertheless, the various departments having special statutory powers of summary dismissal tended, even before the Act of August 26, 1950, to merge their summary dismissal procedures with their

[5] For a detailed description of the procedures under Executive Order 9835, see Petitioner's Brief, pp. 15-18; Bontecou, pp. 35-73.

loyalty program, or, more accurately, to incorporate the former in the latter. With the passage of the 1950 Act, explicitly giving employees the right to a hearing, the last department operating under a summary dismissal statute, the Department of the Army, capitulated and agreed to process its cases under the loyalty program.[6]

2. Establishment of the "Employees' Security Program"

The "Employees' Security Program," now in effect for civilian employees of the federal government, was instituted by Executive Order 10450, of April 27, 1953, 18 Fed. Reg. 2489. Full details with regard to this program are set forth in App. 5-29.

In general the present program strongly resembles the Truman administration loyalty program established by Executive Order 9835. Thus:

1. Executive Order 10450 cites the same authority for its issuance as that set forth in Executive Order 9835, plus two additional statutes, viz. (1) R. S. § 1753, 5 U.S.C. § 631, which authorizes the President to "establish regulations for the conduct of persons who may receive appointments in the civil service," and (2) the Act of August 26, 1950, that is, the summary dismissal statute just discussed.[7]

2. Unlike Executive Order 9835, the present Order does not itself prescribe the procedures to be followed. Instead, it provides for termination of employment "in accordance with the said Act of August 26, 1950." As we have shown, however, (*supra*, p. 11), that Act prescribes procedures closely paralleling those of Executive Order 9835. The principal difference is that there is now no appeal to a

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[6] This merger of the summary dismissal procedures into the loyalty program operating under Executive Order 9835 is summarized in Bontecou, pp. 36-37.

[7] To justify this invocation of the latter statute, Executive Order 10450 provides that the provisions of that Act shall apply, in addition to the departments and agencies specified in it, "to all other departments and agencies of the Government". See *supra*, p. 11.

central loyalty review board, and the head of each agency and department is given the final power of decision. In addition, Sample Regulations were attached to the Executive Order and, as under Executive Order 9835, each department and agency has issued regulations detailing its procedures (App. 17).

3. The current Order sets forth as its "standard"

> "whether the employment or retention in employment in the federal service of the person being investigated is clearly consistent with the interest of national security."

The Order then goes on to state that investigations pursuant to it shall develop information which "shall relate, but shall not be limited, to the following:". There then follows a lengthy list of activities or associations of various sorts. Some of these relate to loyalty, and are similar to, or identical with, those set out in Executive Order 9835. Others are, however, considerably broader, and relate not to loyalty but to personal suitability and even to susceptibility to pressure. Thus, this portion of the Order reads in part:

> "(1) Depending on the relation of the Government employment to the national security:
>
> "(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.
>
> * * *
>
> "(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion."

3. The Finding of Guilt Under the Present Program

The thesis of Petitioner's Brief is that if the government establishes a procedure which has the appearance of a trial on the merits, and looks to the discharge of an employee on the basis of a determination of guilt "which ruins the reputation and career of the accused," then

due process requires that the hearing be a fair one in the accepted sense, and the determination may not be made arbitrarily. (Petitioner's Brief, p. 10.)

Petitioner's Brief relies primarily on *Wieman* v. *Updegraff*, 344 U.S. 183, in which this Court said (p. 190-191):

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'"

And the Court concluded:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." (344 U.S. at 192.)

In the light of the language of the Court, and of the Petitioner's line of argument, it is worth noting that the current "Employees' Security Program," like the Truman loyalty program, does involve a system for discharging employees, after a hearing which has the appearance of a trial on the merits, on the basis of an adverse determination which ruins the reputation of the accused.

As regards the standard for discharge, it is more vague, but, we believe, an adverse finding under it is equally disastrous to the reputation, equally "a badge of infamy." The entire history of the transition from the Truman loyalty program to the Eisenhower security program indicates that the latter was simply an effort to "tighten up" the former. The finding which the Order requires for discharge, that retention is "not clearly consistent with the interest of national security," is itself highly derogatory. Further, the acts and associations which the Order lists as justifying an adverse finding are of types which are at worst infamous and at best injurious to the future career of the accused.

Finally, high government officials have repeatedly labeled employees discharged under the present program as "Communists" or "subversives" or as disloyal. Repeatedly they have made it clear that they consider discharge under the present program "a badge of infamy." Here are some typical statements (Italics have been supplied):

(1) *President Eisenhower:* "I repeat my previously expressed conviction that *fear of Communists actively undermining our Government* will not be an issue in the 1954 elections. Long before then, this administration will have made such progress in rooting them out under the security program developed by Attorney General Brownell that this can no longer be considered a serious menace. *As you already know, about 1,500 persons who were security risks already have been removed.*" (President Eisenhower Press Conference statement 12-2-53: New York Times 12-3-53.)

(2) *Attorney General Brownell:* "Fourteen hundred fifty-six persons have been ejected from Government service because they were found to be security risks . . . *We are going to have no more Communist infiltration in the Government and we steadily are getting rid of those who are security risks.*" (Attorney General Herbert Brownell at Chicago, 11-6-53: New York Times 11-7-53.)

(3) *White House Counsel Bernard Shanley:* ". . . 1,456 subversives have been kicked out of Government jobs since the President assumed office . . ." (Bernard M. Shanley, counsel to the President, in a speech to Advertising Club of New Jersey, 11-6-53: New York Times 11-7-53).

(4) *Senator McCarthy:* ". . . the new Administration has already rid itself of 1,456 security risks inherited from the Democratic Administration—*practically all of whom were removed because of Communist activities or connections or perversion.*" (Senator McCarthy on nationwide television program, 11-24-54.)

". . . Senator McCarthy . . . said flatly that '*90*

percent [of government employees] *were removed because of Communist connections and activities.'* "—(Marquis Childs in the Washington Post, 2-3-54.)

(5) *Mrs. Oveta Culp Hobby:* ". . . [Mrs. Hobby] said that when she took office she found 'little or no security program' except in the public health service. She recalled that the Eisenhower administration *has fired 1,456 persons who were regarded as security risks in all departments* . . . 'All cases handled under the previous loyalty program are being reexamined . . . *We are determined that every member of the department* must be reliable, trustworthy, of good conduct and character, *and completely loyal to the U. S.'* " (Chicago Tribune, 2-24-53.)

(6) *Postmaster General Summerfield:* "Almost 2,200 people who were security risks are no longer using your tax money. I am here to tell you we are not hiring any new ones. Somehow, I do not feel too amiably inclined toward *people who make treason a preoccupation.*" (Postmaster General Summerfield, quoted in Post Office Department Press Release on Speech to New York City Industrial Conference Board, 1-21-54.)

(7) *Senator (then Representative) George Bender (Ohio):* ". . . we have eliminated more than two thousand Communists and fellow travelers from important positions in the government of the United States. Every one of these jobs was obtained under the Democratic Administration." (Senator Bender (R., Ohio), press release, 1-15-54.)

In view of these statements of high government officials, it would hardly be open to the government to contend that discharge under the "Employees' Security Program" involves no invidious finding of guilt. In this respect, this program seems to stand on precisely the same footing as the Truman loyalty program which preceded it.

4. The Distinction Between Applicants and Employees

Both Executive Order 9835 and its successor Executive Order 10450 provide for security or loyalty screening of job applicants, as well as of employees. The screening of applicants may, however, involve simply an investigation, upon the basis of which the employing agency decides whether to hire. There is no required procedure of charges, hearing, appeal, and adjudication: indeed an applicant who is rejected on security grounds may never know that that was the reason for his rejection (App. 18).

B. Security Programs for Military Personnel

Civilian employees of the military departments are subject, like those of the other departments, to the "Employees' Security Program" just discussed. Military personnel, both officer and enlisted, are subject to other separate, though similar, programs.

These military personnel security programs do not have statutory authorization, but are governed by regulations promulgated by the Defense departments. A rather detailed description of these programs appears in the Appendix, pp. 41-50. In general, they resemble the "Employees' Security Program", both as to standards and criteria and as to procedures.

These military personnel programs do, however, have certain variations as regards draftees, which arise out of the fact that their service is involuntary. Thus, under these programs, volunteers are treated just as applicants for employment are under the "Employees' Security Program". That is, there is an investigation and if it results unfavorably they simply are not accepted (App. 43-4); there is no procedure of charges, hearing, appeal, and adjudication. The military departments apparently feared, however, that draftees might pretend to be subversive in order to avoid service. Accordingly they are treated like employees, rather than applicants, but with two variations from the "Employees' Security Program".

The first of these is that the burden of proof is reversed. Whereas the "Employees' Security Program" provides for retention only if "clearly consistent with the interests of national security", draftees are retained unless there is sufficient derogatory information to require discharge (App. 44).

The other difference is that if there is some derogatory information against a draftee, but not enough to warrant discharge, he may be retained in the service under controlled conditions (App. 45-6). Since all officers, both commissioned and non-commissioned, are deemed to hold sensitive positions, draftees in this twilight category have no possibility of promotion (App. 46).

There are at present something over 3,000,000 persons in the Armed Forces, all of whom are subject to these security programs. In addition, turnover in the Armed Forces, necessitates the induction of some tens of thousands of new persons each month, all of whom are covered by the programs. Thus, during the course of a few years these programs have application to may millions of persons.

C. Defense Contractors' Personnel Clearance

Probably the most important of all of the loyalty programs, from the standpoint of the number of persons affected, is that applicable to employees of defense contractors. This program, which is operated by the military departments, covers defense contractors' employees who use classified information, or have access to areas where classified production is carried on.[8]

Since 1950 about half a million employees have been cleared for top secret, secret, and confidential information, and an additional two million have been cleared for area access (App. 50). During the same period some 700 workers have been denied clearance. Currently about four

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[8] No distinction is made in this program between "employees" and "applicants for employment" (App. 51).

thousand employees are being screened monthly under this program.

This program is operated without statutory authority: each defense contractor agrees, as part of his contract, to abide by it. The current version of the program is embodied in Department of Defense Regulations, issued May 4, 1953.

The details of this program are set out in the Fund study (App. 50-53). In a number of respects it deviates considerably from the "Employees' Security Program".

One such divergence, and one of major importance to unions, is that the initial screening of employees who require only the lowest level of clearance, that is, who have access only to "confidential" material, is undertaken by the plant management. On the basis of its own beliefs or information, or of data supplied by the military, plant management determines whether there is "derogatory information" against the employee in question. The Fund study recited that, to handle this initial screening,

> "Many facilities have therefore had to establish large investigative staffs of their own or utilize detectives and credit agencies. FBI information is not available directly but it may come through the military department." (App. 51.)

If the management determines that there is "derogatory information" against an employee, the further handling of his case is turned over to the military department having security cognizance of the facility. In the case of employees requiring a higher degree of clearance, viz., access to top secret or secret information, clearance is handled by the military at the outset.

If the security office of the military department having responsibility for the facility thinks clearance should be denied, the case is forwarded to the appropriate Industrial Personnel Security Board. There are three of these Boards, each with a geographical jurisdiction. The eastern Board is administered by the Army, the central by the Air Force,

and the western by the Navy. This means, of course, that a loyalty-security case initiated by one of the military departments may go before a Board administered by another of the departments.

When a case reaches a Board, it goes first before a Screening Division of three members. If the three members unanimously favor clearance, it is granted and that is the end of the case. If they do not, a notice of denial of clearance, and of the reasons therefor, are forwarded to the employee. This notice parallels the "statement of charges" used in the "Employees' Security Program".

The employee may file an answer and, if not then cleared by unanimous vote of the Screening Division, may appeal to the Appeals Division of the Board. At this point he has the right to an administrative hearing, of the sort usual in the loyalty-security programs. These hearings are conducted like those under the "Employees' Security Program" and the same criteria are used as are used by the military departments under that program (App. 53).

There is no provision for any appeal from the decision of the Appeals Division. Apparently, however, the Secretary of the department concerned can intervene if he sees fit (App. 53).

A second major respect in which this program differs from that for government employees is that denial of security clearance need not mean dismissal for the employee, if the employer is willing, or can be induced by the union, to transfer the employee to work not requiring security clearance. It has been the experience of CIO unions, however, that employers lean to automatic dismissal.

This program, and the "Port Security Program" discussed *infra* pp. 25-27, may present a different constitutional issue than do the loyalty-security programs for government employees. Up at least until this Court's decision in *Wieman* v. *Updegraff*, 344 U. S. 183 the government

defended the constitutionality of the loyalty programs for federal employees upon the "facile generalization that there is no constitutionally protected right to public employment" (344 U. S. at 191). It is not perceived how this generalization was ever thought to apply, however, to employment in private industry.

D. Proposed Extensions of Loyalty-Security Programs to Other Industrial Facilities

As stated *supra* p. 17, the loyalty-security program operated by the military departments for certain employees of defense contractors—viz., those having access to classified information—does not rest on statutory authority, but on contract.

The McCarthy Investigations Subcommittee (of the Senate Government Operations Committee) in its final Report, just released, calls on the Defense Department to use its contracting authority to extend its loyalty-security program to all employees of government contractors doing defense work, whether or not the particular employees have access to classified information (DAILY LABOR REPORT, January 10, 1955, p. A-6).

This same Report likewise calls for the enactment of the "Defense Facilities Protection Act" which passed the Senate last year during the final week of the regular session (100 Cong. Rec. 14118), but did not come to a vote in the House. This bill (S. 3428, H. J. Res. 527, 83rd Congress, 2nd Session), drafted by Attorney General Brownell, authorizes the President to

> "institute such measures and issue such rules and regulations as may be necessary to bar from access to any defense facility or facilities individuals as to whom there is reasonable ground to believe they may engage in sabotage, espionage, or other subversive acts".

It further provides that any individual barred from access shall be notified in writing of the charges against him, and

be given "an adequate opportunity to defend himself * * * including, if he so requests, a hearing * * *". But the bill further provides that

> "Nothing contained in this Act shall be deemed to require any investigatory organization of the United States Government to disclose its informants or other information which in its judgment would endanger its investigatory activity: *Provided, however,* That in the event that such information is not disclosed the individual charged shall be furnished with a fair summary of the information in support of the charges against him."

Thus, this loyalty-security program, too, like those already in operation, would rely on secret witnesses, whose identity would remain unknown either to the accused or to his judges. Senator Ferguson, who introduced the bill, made that perfectly clear to the Senate. He said (100 Cong. Rec. 14116):

> "However, no hearings under the act will require that any Government investigative organization disclose its informants or other information if in its judgment disclosure would endanger its investigatory activity.
>
> "Mr. President, that is not an unusual provision. If it were necessary to give the names of informants or agents of the United States Government, and if the disclosure of those names or that information would endanger our investigatory activities in this field, naturally they would not have to be given. But the law does require that charges be specific enough to enable a defense to be made, despite the provision for protection of security information. In other words, if the Government does not wish to give the names or information which would lead to disclosure of the names, it must nevertheless give information specific enough so that the accused may be given an opportunity to answer. It would appear, on the basis of recent decisions involving the Magnuson Act, which

was taken to the upper court, that this would meet the requirements of due process.

"I cite the cases of *United States* v. *Gray* (207 F. (2d) 237, 241-242 (C.A. 9th, 1953)); *Parker* v. *Lester* (112 F. Supp. 433, 443-444 (N. D. Calif., 1953)); see also *United States* v. *Nugent* (346 U. S. 1), involving hearing procedures under the Selective Service Act."

To the same effect, see the Senate Committee Report (Report No. 1818), pp. 3-4.

The bill defines the term "defense facility" as having the same meaning as in Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. § 781 ff., except that it is not to include vessels, piers, or waterfront facilities. Under the Internal Security Act of 1950 a "defense facility" is any facility designated as such under that Act by the Secretary of Defense (50 U.S.C. § 784 (6)), and he is authorized to so designate (50 U.S.C. § 782 (7)):

> "any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, * * * mine ,railroad, public utility, laboratory, station, or other establishment or facility, or any part, division or department of any of the foregoing."

Thus, the Defense Facilities Protection Act will, if it becomes law, authorize the application of a loyalty-security program to the great bulk of the nation's workers. And it will be a program of the type that is already so familiar: a derogatory adjudication upon the basis of a police file by judges who are not themselves trusted to know the names of the police informers.

E. Atomic Energy Commission

The Atomic Energy Commission operates a loyalty-security program applicable to, probably, several hundred thousand persons.[9] Some of these are employees of the

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[9] Gellhorn, *Security, Loyalty and Science* (Cornell, 1950), p. 82, states:

Commission itself, but most of them are employees of private companies who are constructing or operating installations under contract with the Commission. The same loyalty-security program applies to Commission personnel and to that of its contractors.

The AEC loyalty-security program rests on direct statutory authority (App. 53). The program is described in the Fund study (App. 53-58), and in more detail in Gellhorn, *Security, Loyalty and Science* (Cornell, 1950).

The AEC program differs from the "Employees' Security Program" in the following respects:

(1) The "standard" is phrased in terms of the danger to the common defense or security. It provides that the determination shall be one "which balances the cost to the program of not having his services against any possible risks involved." (Gellhorn, p. 86.)

(2) Since 1950 applicants as well as incumbents have been granted hearings under the program, in contrast with the normal practice as to government personnel (App. 57).

(3) The employee is given the right to challenge for cause the members of the Personnel Security Board which is to hear his case (App. 58).

(4) While only one hearing is provided, there are rather more layers of appeal. Thus the findings and statement of reasons of the Personnel Security Board are submitted to the Manager. The Manager then makes a determination and findings, which are given to the employee. The employee may then appeal to the Personnel Security Review Board, and submit briefs. That Board reviews the case and makes a recommendation to the General Man-

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"From January 1, 1947, to April 30, 1949, a total of 141,469 individuals were evaluated by the Atomic Energy Commission. During 1949 there arose a total of 37,561 new personnel clearance cases, and this number may sharply increase as new installations come into being."

We do not have any more recent data on the numbers of persons covered by this program.

ager. The decision of the General Manager is normally final, but the Commission itself sometimes considers important cases, such as that of Dr. Oppenheimer. It may be questioned whether this multiplicity of paper appeals is of any real benefit to the employee.

F. The "Port Security Program"

The Port Security Program is a loyalty-security program applicable to merchant seamen and shoreside personnel with access to waterfront facilities.[10] It is operated by the Coast Guard, with the cooperation and the participation of the maritime labor unions (CIO-AFL) and management. (Certain other unions, expelled from the CIO in 1949 as Communist-dominated, do not participate in the administration of the program or cooperate with it.) The Fund study estimates that this program affects more than half a million people (App. 58-59).

The present program is based on a statute enacted in 1950 after the outbreak of the Korean War (App. 59). This statutory program superseded a voluntary plan instituted by maritime labor (CIO-AFL) and management through the Department of Labor, and the Coast Guard (App. 59).

Every merchant seaman on deep sea ships is required by statute to have a federal certificate or license. Under the Port Security Program seamen who receive clearance are issued a new certificate or license, known as a validated document.

Clearance is denied if the presence of the worker "aboard vessels of the United States would be inimical to the security of the United States". The criteria (App. 59-61) are essentially the same as those of Executive Order 9835.

Since the program applies to all employment on ships

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[10] No distinction is made between "applicants" and "employees." In view of the sporadic nature of these types of employment, such a distinction would hardly be possible.

carrying the United States flag, a denial of clearance means that the worker is completely forbidden to work at his normal trade or calling. He does not have even the theoretical option of working at his trade in some private employment not covered by the program. And, his reputation destroyed by the denial of clearance, the possibilities of employment in another trade become more and more illusory.

In addition, the program applies to persons seeking access to designated waterfront facilities, which now includes all major port areas. Longshoremen and other workers covered by this part of the program, who do not have seamen's papers, are issued a "Port Security Card".

The initial determination of whether to grant clearance is made by a Coast Guard Marine Inspection Office, upon the basis of the FBI and the Office of Naval Intelligence (ONI) files. If clearance is denied, the worker is notified in writing and may then have recourse to the hearing procedures provided in the program.

As the result of union cooperation in the administration of this program, its procedures are substantially less unfair to the workers covered by it than are the procedures of any of the other loyalty-security programs. Thus:

(1) The initial hearing is before an Appeal Board, which is convened at one of the ports. The Board, unlike any of the other hearing boards, is tripartite in its composition. The chairman represents the Coast Guard, while one member is from management and one from labor. The management and labor representatives are chosen from panels supplied by the Secretary of Labor, and the labor member is normally from the same union as the worker (App. 62).

(2) The worker is informed in advance who the members of the Board will be, and what their business or union affiliations are. He may challenge any member of the Board for cause, and in addition he is given two peremp-

tory challenges, one as to the management representative and one as to labor. Further the worker may decide whether the replacement for the challenged member will be from management or labor, as appropriate, or from the public members of the panel (App. 62).

(3) The worker is supplied, in advance of the hearing, with a bill of particulars (App. 62).

(4) The worker may decide if the hearings are to be open or closed (App. 62). (Closed hearings are the rule under the other programs.)

(5) On the hearing record, and on the FBI and ONI files (undisclosed to the worker), the Board makes a recommendation, together with a statement of reasons, to the Commandant of the Coast Guard. If the Commandant's decision is adverse, the worker may appeal to, and have a hearing before, the "National Appeal Board" which sits in Washington. This Board also is tripartite, and the worker has the same rights before it as before the Appeal Board, including the same right to challenge.

(6) The National Appeal Board also sends its recommendation, together with its reasons, to the Commandant of the Coast Guard, who nominally still makes the final decision. In actual practice, however, the Commandant accepts the decision of the National Appeal Board.

G. International Organizations Employees Loyalty Program

Late in 1952 the Administration decided to apply the Federal Employees Loyalty Program to all United States citizens employed by, or being considered for employment by, public international organizations of which the United States was a member. To this end, President Truman, on January 9, 1953, issued Executive Order 10422 making the provisions, procedures and standards of Executive Order 9835 applicable in these cases.

The International Organizations Employees Loyalty Program created by Executive Order 10422 applies to

United States citizens employed in or being considered for employment in sixty-six (66) international organizations in which the United States participates.[11] These range all the way from such well-known international agencies as the United Nations, the International Bank for Reconstruction and Development, the International Monetary Fund, the World Health Organization, the International Labor Organization and the United Nations Educational, Scientific and Cultural Organizations, to such relatively unknown organizations as the Inter-Parliamentary Union For The Promotion of International Arbitration, the Postal Union of the Americas and Spain, the International Whaling Commission and the International Commission of the Cape Spartel Light.

As of December 10, 1954, 3,939 employees and persons seeking employment with over 40 international organizations had been processed under this program and there were 158 cases pending.[12] These proceedings were conducted by the International Organizations Employees Loyalty Board, which carried on investigations and held hearings not only in the United States but also in Rome and in Paris. The Board also scheduled hearings in Geneva, but they were called off when the Swiss Government refused the members of the Board permission to enter Switzerland.

Executive Order 10422 was modeled on Executive Order 9835. After Executive Order 9835 had been superseded by Executive Order 10450, Executive Order 10459, instituting the present international organization employees loyalty program, was issued on June 4, 1953. It provides that there shall be an International Organizations

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[11] Publication 3655 of Department of State, released February 1950.

[12] Resignation letter of Pierce J. Gerety, Chairman of the International Organizations Employees Loyalty Board, dated December 10, 1954, and released on December 17, 1954, by the U. S. Civil Service Commission.

Employees Loyalty Board of not less than three impartial persons. The Board is charged with the responsibility of inquiring into the loyalty to the Government of the United States of United States citizens employed, or considered for employment, by international organizations of which the United States is a member, and of making advisory determinations in such cases for transmission by the Secretary of State to the executive heads of the international organizations. The Board is directed to supply a written statement of the alleged derogatory information to the individuals concerned, to provide the individuals with an opportunity to answer or comment upon the statement of alleged derogatory information, to afford opportunity for hearing before the Board or a panel thereof, and to make its determinations upon all the evidence.

Executive Order 10459 provides that the employee is only to receive notice of such derogatory information "as security considerations permit," that the employee is given the right to cross-examine only those "witnesses offered in support of the derogatory information", that the Board is to base its decision upon all the evidence "including such confidential information" as the Board may have in its possession, and that the Board is to conduct its hearing in such a manner "as to protect from disclosure information affecting the national security."

The investigation of all American applicants created "a serious bottleneck in the recruitment of United States citizens by international organizations, particularly in the technical and professional fields." The international agencies turned to non-Americans since Americans were not immediately available for employment because of time-consuming investigations, and "delay in security clearances was sometimes unfairly misunderstood as a reflection upon the individual concerned." [13]

[13] Resignation letter of Pierce J. Gerety, Chairman of the International Organizations Employees Loyalty Board, dated December

II—STATE AND LOCAL ACTION

The past half dozen years have seen state and local governments following in the footsteps of, and at times even outdoing, the Federal Government in their loyalty-security programs. Many States and municipalities have adopted an all-embracing concept of security and have applied their loyalty-security programs to individuals whose work is even more remote from the national security than that of appellant in the case at bar.

The loyalty-security prairie fire which the Federal Government sparked has caught on in different communities in different ways. Whatever the method followed, it is today very difficult to find a State which still requires no more than the traditional oath of allegiance to the Federal and State Constitutions, and which does not, in some form and to some degree, inquire into the past and present affiliations of present and would-be jobholders. Such loyalty-security inquiries fall into three broad categories:

1. Programs analogous to that applied to federal employees under Executive Order 9835 and its successor, Executive Order 10450.

2. Public employees' loyalty oaths without specific programs of implementation.

3. Loyalty-security inquiries as an adjunct to state licensing and taxing power.

1. State and Local Programs Analogous to that Applied to Federal Employees [14]

Among the States and cities with loyalty-security statutes which may be considered as spiritual relatives of the

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10, 1954, and released on December 17, 1954, by the U. S. Civil Service Commission.

[14] Much of the following material has been adapted from a manuscript, thus far unpublished, written by Professor Ralph S. Brown, Jr., of the Yale Law School.

Federal program are the following: California, Florida, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New York, Ohio, Pennsylvania and Texas; Baltimore and New York City.

The Ober Law in Maryland (Flack's Annotated Code of Maryland (1951) Art. 85 A), the oath provision of which was interpreted and upheld by this Court in *Gerende* v. *Board of Supervisors*, 341 U. S. 56,[15] set the pattern subsequently followed by many other States. Under the Ober Law, all of the many state agencies are required to screen all applicants for state jobs to determine whether they are subversive; incumbents are to be similarly screened and are to be discharged wherever "reasonable grounds" exist for belief that they are subversive; an Assistant Attorney General is provided to enforce the Act; and private educational institutions which receive state aid must set up similar machinery for discovering subversives and discharging them from their staffs.

Florida, Georgia, Louisiana, Mississippi, New Hampshire, Ohio, Pennsylvania and Washington have all adopted the basic provisions of the Ober Law, establishing procedures for screening applicants and employees, and for discharging and denying employment to individ-

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[15] In this *per curiam* decision, the only issue before the Court was the denial to appellant of a place on the ballot for a municipal election on the ground of her refusal to file the loyalty affidavit required by the Ober law. The Court held that the affidavit requirement would be fulfilled by an oath that the affiant is not a person who is engaged "in one way or another in the attempt to overthrow the government *by force or violence*" (Emphasis is the Court's). As so interpreted, the Court held the requirement lawful. The Court did not have before it in the *Gerende* case, nor also in *Garner* v. *Board of Public Workers of Los Angeles*, 341 U. S. 716, any issue involving secret informers, non-confrontation, or any other aspect of due process in arriving at administrative determinations of loyalty or security.

uals as to whom there are "reasonable grounds" to believe them subversive.[16]

Under the California statute (Deering's Calif. Code (1953 Pocket Supp.), Government T. 1, par. 1028) all public employees are liable to dismissal for refusal to answer questions about past as well as present subversive affiliations. The investigating responsibility rests with the employing agency, but the administrative procedures are not spelled out in the law.

New York adopted the first out-and-out state "security risk" statute (65 McKinney's Consolidated Laws of New York, §§ 1101-1108 (1954 Cum. Supp.)). This law is administered by the State Civil Service Commission, which has the authority to transfer, suspend, or discharge employees in sensitive positions, and which is authorized to make use of the list of subversive organizations issued by the Attorney General of the United States. In addition, New York has the Feinberg Law (N. Y. Laws 1949, C. 360) upheld by this Court in *Adler* v. *Board of Education*, 342 U.S. 485, which authorizes the Board of Regents to use the Attorney General's List in determining the loyalty of New York teachers and which makes a teachers' membership in a listed organization a presumption of disloyalty.[17]

Connecticut provides that ". . . membership in subversive organizations as defined by the United States Department of Justice shall constitute cause for dismissal unless

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[16] Florida Statutes Anno. Ch. 876; Georgia Code Anno. Ch. 89, ss. 311-316; Louisiana Revised Statutes, Ch. 14, ss. 358-365; Mississippi Code Anno. ss. 4064-01 et seq.; New Hampshire Laws, ch. 180 (1953); Anderson's Ohio Revised Code, ss. 143-272; Purdon's Pennsylvania Stats. Anno. T. 65, Ch. 11; Washington Revised Code, Ch. 9.81.

[17] The *Adler* case is readily distinguishable from the case at bar in that full hearings were to be accorded both the organizations listed and the individuals charged. No issue was presented to the Court of secret informers or non-confrontation and for all that appeared to the Court in that case, the full hearing required by statute barred secret informers and provided for confrontation.

promptly disavowed by the employee." (Rule 17, Rules and Regulations and Related Statutes for State Classified Service). As in the case of California, the administrative procedures are not spelled out.

Indiana declares its public policy to be "to exterminate Communism and Communists and any and all teachings of the same" (Burns Indiana Statutes 10-5202), but gives no indication as to how this policy is to be effectuated.

Employees and applicants for employment with the District of Columbia Government are subjected to loyalty-security investigations and procedures which, in their essentials, are similar to those applicable to federal employees, although these procedures are not embodied in any formal document or order.[18] No doubt other jurisdictions have, by informal action, similarly put into effect loyalty-security programs analogous to the federal program.

Among the cities, in 1948 the School Board of Baltimore adopted a Resolution applying to school employees a loyalty program modeled after Executive Order 9835 ("State Government," February, 1954—publication of Council of State Governments). And in New York City the Mayor has authorized the Commissioner of Investigations to conduct a security clearance of all city employees (New York Times, March 26, 1954).

2. Public Employees' Loyalty Oaths

Among the States, territories and cities which now require their employees to swear that they are not subversives or members of subversive organizations are the following: Arkansas, California, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New

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[18] Affidavit in support of Motion to Dismiss the Indictment in *United States* v. *Marcus Singer*, Criminal No. 1150-54, United States District Court for the District of Columbia.

Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, West Virginia, Alaska, Hawaii, Annapolis (Maryland), Detroit (Michigan), Los Angeles (California), and Wyandotte (Michigan). While there is no specific means provided for policing many of these oaths, there are nonetheless three effective penalties available: denial of employment to any person who, for whatever reason, refused to take such an oath; dismissal if administrative procedures indicate doubts as to the underlying facts; and a perjury indictment if any employee wilfully falsified his oath.

The language of these oaths varies. Some, like Texas and Detroit, make specific reference to the list of subversive organizations put out by the Attorney General of the United States. Some, as in Texas and California, make reference to past as well as present affiliations. Several, such as Arkansas, Idaho, Mississippi, Montana, Nebraska, Oregon and West Virginia, are patterned after the oath required of Civil Defense Workers by the Federal Government.[19]

Education has become the special beneficiary of loyalty oath requirements. Thus, in Rhode Island, a special oath is required of teachers, part of which states that:

> "I affirm, in recognition of my official obligation, that though as a citizen I have the right of personal opinion, as a teacher of the public's children I have no right, either in school hours, or in the presence of my pupils out of school hours, to express opinions

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[19] The pertinent part of this oath is as follows: ". . . . And I do further swear (affirm) that I do not advocate, nor am I a member or an affiliate of any organization, group, or combination of persons that advocates the overthrow of the Government of the United States by force or violence; and that during such time that I am a member of the (name of civil defense organization), I will not advocate nor become a member or an affiliate of any organization, group, or combination of persons that advocates the ov throw of the Government of the United States (or of this state) by force or violence. 50 USCA App. 2255(b).

> that conflict with honor to country, loyalty to American ideals and obedience to and respect for the laws of Nation and State" (Page 11, *Teachers' Oaths and Related State Requirements,* publication of National Education Association, June, 1949).

Georgia, in prescribing its loyalty oath, forbids its teachers from "teaching any theory of government or economics or of social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism." (Page 10, *Teachers' Oath and Related State Requirements*). As we have pointed out in the previous section, it is Indiana's public policy to exterminate all teaching of Communism.

The State of Alabama has adopted a law which forbids the use by any state school of any textbook:

> "which does not contain a statement by the publisher or author thereof indicating clearly and with particularity that the author of the book or other writing and the author of any book or writings cited therein as parallel or additional reading, is or is not a known advocate of communism or Marxist socialism, is or is not a member or ex-member of the Communist Party, and is or is not a member or ex-member of a Communist-front organization as designated by the U. S. Congress or any Committee thereof or the Attorney General of the United States" (Code of Alabama, T. 52, s. 433 (6a)).

A similar law is in effect in Texas (Vernon's Anno. Statutes, Art. 6252, s. 7).

Apparently without the benefit of a specific law, the Town of Shaftsbury, Vermont, has seen fit to ban books from its school library in cases where writers have been listed by the Attorney General of the United States as belonging to subversive organizations. (New York Times November 14th, 1953).

What has been the effect of these public employees' and teachers' oath requirements? In Pennsylvania employees of unquestioned loyalty who refused to take the oath

solely as a matter of conscience have been discharged from public employment. (Byse, A Report on the *Pennsylvania Loyalty Act,* 101 University of Pennsylvania Law Review 480 (1953).)

In California over 60 members of the faculty of the University of California either resigned or were dismissed because of refusal to take a loyalty oath, despite the fact that there was no evidence that any of this group were Communists. (Committee on Academic Freedom, Northern Section of University of Calif., Report of February 1, 1951.)

The National Education Association's Chairman of its Committee on Tenure and Academic Freedom quotes President (then General) Eisenhower as saying: "Ignorance of Communism, Fascism or any other police state philosophy is far more dangerous than ignorance of the most virulent disease. Who can doubt the choice of future Americans between statism and freedom if the truth concerning each be held before their eyes?", but questions whether any teacher would dare discuss such controversial issues at the risk of being called disloyal and dismissed from his position. (Foreword to *Teachers' Oaths and Related State Requirements*).

3. Loyalty Inquiries as an Adjunct to State Licensing and Taxing Powers

The "logic" which has dictated the federal loyalty-security programs and which has been followed with respect to state and local public employees, has been applied as well to employment dependent on licensing by the State —as consistency would seem to require. Examples of such government-imposed restrictions are the following:

In the Federal Government, the Federal Communications Commission indicated its plan to require non-Communist affidavits from every applicant for a commercial or amateur radio license. (New York Times, June 13, 1954.)

In Indiana professional boxers and wrestlers are re-

quired by the State Athletic Association to take a non-Communist oath. (New York Times, Oct. 22, 1954.)

In New York, the State Commerce Department refuses to list in its directory of summer camps any camp whose owner will not swear that his camp does not advocate subversive activities nor employ anyone who is a member of an organization on the list of subversive organizations put out by the Attorney General of the United States or by the Board of Regents of the State of New York (New York Times, Aug. 27, 1954).

In California, churches must take a loyalty oath if their property is to remain tax exempt. (New York Times, April 11th, 1954).

Texas has a loyalty oath for pharmacists (Vernon's Anno. Statutes, Art. 4542 a., s. 9).

The District of Columbia has held up licenses to a piano dealer and a liquor salesman on the basis of allegations relating to their loyalty (Washington Daily News, December 8 and 9, 1954).

A detailed study of the various loyalty tests for lawyers (Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 University of Chicago Law Review, 480 (1953)) reveals that Alaska, Colorado, Kentucky, Oklahoma and Washington have all prescribed loyalty oaths as pre-requisites to admission to the bar. Indeed, in Alaska, Colorado and Kentucky the applicant must say that he not only is not, but also that he never has been, an advocate of overthrow of the Government by force or violence. Several additional States have loyalty questions in application forms which must be filled out to demonstrate that the potential attorneys are of good moral character. An extreme example is Hawaii, where applicants are asked:

> "If you were to be listed as a 'Communist' in the records of any federal investigative agency, what past actions or organizational affiliations of yours not already listed by you might be used by such investiga-

> tive agency to support its conclusions? In answering this question, assume that all of your past actions and organizational affiliations are known to such investigative agency."

Nor has the medical profession been altogether immune from loyalty inquiries. In New York two doctors who had been convicted of contempt for failure to produce the books of the Joint Anti-Fascist Refugee Committee to Congressional Committees, were suspended by the Board of Regents from the right to practice medicine. See *Barsky* v. *Board of Regents*, 347 U.S. 442.

An example of what has been happening in local communities is the requirement of the Harrison, New York, Board of Education that officers of any community organization wishing to use school facilities, as well as any guest speakers appearing in the school, must take a loyalty oath. (New York Times, August 30th, 1953.)

What began as a federal employees' loyalty program has thus found its way into all types of employment throughout the land, and continues to spread day by day to areas even more remote from security considerations than is told in the case at bar. We call the Court's attention in this connection to the opinion of the Pennsylvania Common Pleas Court in *Fitzgerald* v. *City of Philadelphia* No. 6212, September Term, 1952. Speaking for the Court, Judge Bok upheld the Pennsylvania Loyalty Oath statute, but made it clear that he was doing so reluctantly and only because the Supreme Court of the United States had upheld similar statutes. In the words of Judge Bok:

> "The loyalty or disloyalty of a ditchdigger or leaf raker would be so irrelevant to the safety of the state as to render the entire loyalty system not only absurd but oppressive . . . America was built on dissent and provocation and her answer to Communism lies in the effort of her citizens to achieve her moral purpose." (New York Times, May 5, 1953).

CONCLUSION

For the reasons stated in the brief for Petitioners and in the briefs *amici curiae*, it is submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

PRELIMINARY STUDY
(Revised)

PERSONNEL SECURITY PROGRAMS OF THE FEDERAL GOVERNMENT

A Description of Statutes, Executive Orders, and Regulations

by

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under the direction of

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The United States government operates five distinct security programs.[1] They represent decisions that government employment, military service, defense production, atomic energy development, and shipping are vital security areas and that the employment of certain defined security risks in these fields must be barred. What follows is a description of those programs. It indicates the authority and standards under which they operate, the steps in the procedure and the chief similarities and differences to be found.

I. CIVILIAN AGENCIES

In the last years of the Truman administration, the majority of government employees were subject to both a loyalty and a security program. The loyalty program was established by Presidential Executive Order 9835, March 21, 1947, based on his powers under the Civil Service Act and section 9a of the Hatch Act. This section makes it unlawful for any person employed by the Federal government and drawing compensation under an Act of Congress to be a member of any political party or organization advocating the overthrow of the government by force or violence.[2] All employees of the executive branch were covered by this Order. The Security program derived its existence from Public Law 733, passed in 1950. This Act, which replaced World War II legislation applicable only to the military departments, permitted the

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[1] The government may also require a loyalty oath as a prerequisite to certain grants. Fellowships awarded by the Atomic Energy Commission are made subject to investigation even though the area of research is not classified. Recipients of National Science Foundation fellowships must execute a loyalty oath.

The program for investigation and clearance of the employees of the United Nations and its specialized agencies is beyond the scope of this memorandum. The United States government, by Executive Order 10422, Jan. 1953, as amended E. O. 10459, June 1953 established an International Organizations Employees Loyalty Board in the Civil Service. This Board transmits recommendations as to the employees' loyalty to the Secretary-General.

[2] A standard rider of every Appropriation Act since 1941 has been a prohibition of the use of money appropriated by the Act to pay persons who advocated or belonged to organizations that advocated the overthrow of the Government by force or violence. It is a felony for any such person to accept wages or salaries paid under the Act.

heads of certain designated agencies[3] to suspend summarily and to dismiss employees when national security warranted the action.

In 1951, the Interdepartmental Committee on Internal Security and the Civil Service Commission surveyed these programs at the President's request. They reported in 1952 that a government employee might be separated involuntarily under three standards, loyalty, security, and suitability. In practice, it was difficult to separate the three; some departments were already administering combined loyalty-security programs. A recommendation was made to create an integrated procedure covering all dismissal for cause. In view of the election results, nothing further was done.

Public Law 733 and Executive Order 10450

A new security program was promised in President Eisenhower's first State of the Union Message and established in Executive Order 10450, of April 27, 1953. The Order extended the operation of Public Law 733 to all executive agencies and departments. The Loyalty program was abolished, the Loyalty Review Board given 120 days to finish its work. The head of each agency and department was made responsible for his unit's program; central review was discarded. The Civil Service Commission is a record keeper and a surveyor, but is accorded no control.

The Order set out investigative requirements for government employees. It established a new set of criteria by which the results of such investigation were to be measured. These criteria combine indicia of disloyalty, pressure risk, other security risks, and personality suitability problems. The standard to which these criteria were to be applied is that the employment of the individual must be clearly consistent with the national security. National security is defined to include the "military, economic and productive strength of the United

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[3] The Departments of State, Commerce, Justice, and Treasury (with respect to the Coast Guard), The Defense Department and its component parts (Army, Navy and Air Force) the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. The Office of Defense Mobilization absorbed the National Security Resources Board.

States." The definition appears in the Regulations, not in the Executive Order.

The procedural minimum is prescribed by Public Law 733. The Executive Order was silent on this point. The Sample Regulations recommended by the Department of Justice combined the standards and investigative requirements of the Order with an elaboration of the procedure required by Public Law 733. The Act and the Executive Order are, of course, binding on all agencies, but the sample regulations are not. They were, however, adopted, with some changes, by the civilian agencies of the government.

Public Law 733 allows the head of the agency "in his absolute discretion and when deemed necessary in the interest of national security" to suspend without pay any employee of the agency. The employee must then be notified of the reasons for his suspension, with whatever degree of specificity that security, in the opinion of the agency head, permits. He may show cause, in written statements and affidavits, why he should not be removed from his position. Employees who are citizens, with permanent or indefinite appointments past the trial or probationary period[4] are given, within thirty days of suspension, a statement of charges, a right to answer these charges in writing, and a further right to request a hearing by the agency.

Public Law 733 can, by its own terms, be extended to other departments than the ones enumerated if the President deems it necessary in the best interests of national security. Executive Order 10450 is based on this provision.[5]

Every agency and department of the executive issued regulations pursuant to the Executive Order. This section of the memorandum reviews nine sets of regulations in addition to

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[4] These qualifications are obviously derived from Civil Service Acts. The citizen, past probation, in permanent or indefinite appointment may, in a separation for cause, answer charges. The parallels will be developed in a subsequent section.

[5] The legality of the extension has been questioned. *Cole* v. *Young*, 125 F. Supp. 284 (D. C. 1954). The agencies listed in the Act were for the most part highly sensitive. In the *Cole* case, it was held in effect, that Executive Order 10450 is a finding that all government employment is sensitive. The President, when he extends the act to new agencies, is required to report to the Committee on the Armed Services.

the Sample Regulations of the Justice Department. Six civilian agencies have been sampled: the Post Office, the Veterans Administration, the Department of Health, Education and Welfare, and the Treasury, Justice and State Departments. The Post Office and the Veterans Administration account for 59 percent of federal employment outside the military departments. The regulations of the three military departments will be studied separately; while similar to the civilian agencies, they present unique problems and solutions. Almost 50 percent of all Federal civilian employees are in these three departments.

Criteria of Executive Order 10450

The Executive Order established these criteria as indicative of the existence of a security risk:

"1. Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

"2. Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

"3. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who ad-

vocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

"4. Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

"5. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

"6. Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

"7. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States." (Executive Order 10450, sec. 8.)

(1) (iv) was amended August 4, 1954, by Executive Order 10548 to read:

> "Any illness, including any mental condition of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such cases."

An eighth criterion, refusal to testify before a Congressional committee about alleged disloyalty or other misconduct, under the protection of the fifth amendment, was added October 13, 1953, by Executive Order 10491.

Information raising security questions "shall relate but shall not be limited" to, the criteria of the Executive Order. The military agencies in their regulations have considerably elaborated upon these criteria, but the net effect is the same.

The Attorney General's List of Subversive Organizations

The Executive Order does not define "totalitarian, Fascist, Communist or subversive," nor does it refer to any other source

for definition. The agencies are not limited in these cases to the Attorney General's list. The Attorney General is to advise on the program under the Order and the list has been continued under the new procedure. Nonetheless, the employing agencies are free to make use of other lists or citations.[6]

The Attorney General's list originated under Executive Order 9835, which called for the Attorney General to designate those organizations membership in which would be an indication of disloyalty. The Department relied on the data then in its files and on any further investigation it thought necessary. Organizations were not informed that they were being considered for listing and no hearings were given to allow interested parties to contest the designation. The list was divided into those groups of Fascist, Totalitarian, Communist, and Subversive organizations which advocate force and violence to deny others their rights under the Constitution, and those which seek to alter the government by unconstitutional means. The criteria for listing were never made public. The list was not limited to presently functioning associations.

In the Joint Anti-Fascist Refugee Committee case, 341 U. S. 123, the Supreme Court examined the listing procedure and four Justices found it wanting in due process. The Department of Justice has issued new rules on the composition of the list. In an attempt to comply with the minimum prescribed by the case, an organization is given a notice of proposed listing. The organization may file a notice of contest of this proposal. If it does, it is then sent a statement of grounds for the listing and interrogatories to complete. No case has proceeded beyond this second notice stage thus far.[7]

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[6] Under the old Loyalty program, mere affiliation with an organization not on the Attorney General's list could not be considered. The security programs were not bound by this limitation.

A frequent source of names of organizations for use in these cases is the file of the House Un-American Activities Committee. Another is the lists compiled by the California Un-American Activities Committee, the Tenney committee.

[7] The Attorney General's list has both active and disbanded organizations in it.

The Attorney General, when re-issuing the list for use in the Security program, warned that membership in a group was only one factor that should be considered in a case. 18 Federal Register 2741, May 12, 1953.

Whether the employee is charged with being a member of a group on the Attorney General's list or of some other "subversive" organization he may as a matter of defense show he was innocent of the nature of the group. He may attempt to rehabilitate the organization, but his chance of success is small if it is on the Attorney General's list. He may, however, attempt to show that the group had a different character when he was a member.

Comment on the Criteria

Criteria (2) to (8) were in substance part of the previous loyalty and security program. They include acts illegal in themselves or indicative of a philosophy which, it is thought, would encourage acts against the good of the nation. They range from indications of imminent security risks to political risks, to varying affiliations and associations with security and the political risks, etc.

Of these criteria it is believed that the fifth has been most frequently encountered in security hearings. Some of its terms lack legal definition, though they may draw meaning from administrative practice. The terms used: membership, affiliation, sympathetic association—indicate that more than casual or intermittent patronage is meant; but the extent of participation which is suspect is not to be determined from the wording alone.

Paragraph (1) is the major change wrought by the Eisenhower program. It deals not with disloyal, traitorous or subversive activity, but with various reasons why an otherwise patriotic person may not be trusted to serve the nation. This criterion includes the blabber-mouths, the drunkards, the criminals—the unreliable. It also includes the individual who may be subject to blackmail, through a close relative in enemy hands, through his past or his habits.

There are few legal precedents for defining some of the component parts of this category. Perversion, unreliability, etc., import a variable moral standard. It would be difficult to have a uniform standard; excessive drinking to a teetotaller is not excessive to one who drinks. Subdivision (ii) (deliberate

misrepresentation) raises questions of materiality. Is this section limited to misrepresentation of facts otherwise relevant to security? Or is it disqualifying if a woman employee falsifies her date of birth? Subdivision (v) (pressure or coercion) pertains partly to matters outside the control of the employee. Does it make allowance for the ability of the individual to resist external pressure? These and many other ambiguities in the reliability criteria may be mitigated by the direction to consider the position the employee holds, and the effect his position could have on the national security. A drunken gardener, unlike a drunken State Department executive, need not be a security risk. All of the "loyalty" criteria, however, are treated as grounds for dismissal, whatever the actual security risk involved. Only when the facts raise no loyalty question is a strict "security" standard applied—that is, one which balances the sensitivity of the employment against the gravity of the charges.

Relation to Suitability Procedures

There is a recognized possibility that a security program which includes factors going to suitability might become a way to circumvent customary civil service procedures, especially when the character of the proof of unsuitability is not so substantial as civil service practice might require. The military departments warn, in the regulations covering civilian personnel and in the servicemen's security programs, that these programs are not a substitute for other administrative methods. The Sample Regulation lacks this provision, but a similar warning is found in the regulations of most civilian agencies. The warnings vary in emphasis, however. The Post Office states that Civil Service procedures are to be used to the maximum; the Department of Health, Education and Welfare says that cases remote from security will be processed normally under routine procedure; the Treasury says that security regulations are not to be used to the exclusion of normal procedure; the Veterans Administration provides only that nothing in the new regulations supersedes existing regulations. The Justice Department regulations make no reference to this problem.

Investigations: Pre- and Post-Appointment

An investigation is required for all new employees. Incumbents are investigated when "derogatory information," that is, information relating to the criteria, arises.[8]

The Executive Order divides all government positions into sensitive and non-sensitive, and the extent of the initial investigation of an appointee is determined by the classification of the position he is to fill. The Executive Order defines sensitive as a position "the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." The head of the department or agency, or one to whom he delegates this authority, designates which jobs are sensitive. The Sample Regulations add that such positions include those wherein there is access to classified information and an opportunity to commit acts affecting national security. The civilian agencies, other than the Justice Department itself, include this addition in their definition. Indeed, the Treasury, which originally omitted it, amended its regulations to conform. The addition adds nothing which is not in the original definition but does illustrate it. The State Department has included all its employees in the sensitive category except any excluded by the Administrator, Bureau of Security and Insular Affairs.

The Executive Order says that the scope of investigation will be determined by the degree of adverse effect the holder of the position could have on the national security and proceeds to set as a minimum a national agency check and written inquiries. In practice, initial investigation seems to consist either of this minimum, or to involve a full field investigation. There is no middle ground.

Investigations for non-sensitive positions are usually made after the employee enters on duty. The Civil Service Commission will make an investigation of all employees entering the competitive classified service. The Commission will make the investigation of non-competitive employees for an agency with-

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[8] "Derogatory information" is a term developed under the old loyalty program. The Executive Order does not employ it but the Sample Regulations brought it back into the Security program.

out investigative facilities or for one with which it has an agreement to that effect.[9]

Investigations—National Agency Checks

These investigations consist of a national agency check and inquiry. The agency check is a search of Civil Service records, reports of the files of the Federal Bureau of Investigation, and of the investigative records of the Armed Forces where appropriate. Written inquiries are sent to law enforcement agencies in areas where the employee has lived or worked, to former employers and supervisors, to the references given, and to the schools attended. The addresses are drawn from the personal history statement which all government applicants must complete. The Justice Department requires a full field investigation even for its non-sensitive positions and the State Department makes the same requirement for any position it might designate as non-sensitive. Unlike the full field investigations conducted for sensitive positions, these are made after the employee enters on duty.

An applicant for Federal employment is required to complete Form 57. He lists the places at which he has been employed and the schools he has attended. He gives character references. Further, he must report on any foreign travel and the reasons for it. The applicant is asked about any arrests and any discharge from a job for misconduct. He is further asked if he is now or has ever been a member of a subversive organization and for explanation if the answer is affirmative. No list of organizations is given with the Form nor (until very recently) was there any reference to the Attorney General's list. For sensitive positions, further forms are completed. These will cover all past addresses, all schools, all groups of any kind to which the applicant has belonged.

Under the authorization of the Executive Order, the Civil Service Commission allows a lesser degree of investigation for

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[9] The military departments, State, Justice, Treasury, Agriculture and Post Office departments conduct their own field investigation.

per diem, temporary, or seasonal workers or for aliens employed outside the United States.[10]

Should this agency check and the inquiry develop any derogatory information, the Order requires a full field investigation or any lesser investigation which can allow a determination to be made. For a non-sensitive employee in competitive service or in an agency without investigative facilities, the Commission will make further investigation, limited to covering by personal investigation the adverse information developed. Seriously derogatory material is referred to the FBI.

The Commission will furnish a report of the agency check, the replies to written inquiries, and the report of any investigations made to the officer designated to receive them in the agency. If the written inquiries brought no response, the Commission will make no further attempts to obtain this information. If the Commission did the initial investigation for an agency which has its own facilities, the results of the national agency check and the inquiries are given to the agency, which may then develop any adverse report.

Full Field Investigations

If the position is sensitive, full field inquiry is normally made before the employee enters office. The Civil Service Commission will investigate competitive jobs unless the department head assumes the responsibility by law or agreement. If the position is not competitive, the employing agency investigates if it has the facilities; if it does not, the Commission does it on a reimbursable basis. If the employee has previously worked for the government and been the subject of a full field investigation, and if there has been no break in service over a year, the employing agency will determine the extent of the new investigation it desires.

In an emergency, so determined by the head of the department, a sensitive position may be filled for a limited period by

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[10] The Department of Health, Education and Welfare provides that no temporary appointment which has been made without investigation may be extended or renewed without the written approval of the Personnel Security Officer.

an employee on whom an investigation has not been conducted. The State Department sets a limit of ninety days. A national agency check may be made but this is not required. The incumbent of any position at the time it is designated sensitive may continue to hold it, pending completion favorably of investigation.

Executive Order 10450 requires that the file of anyone who underwent a full field investigation under the previous loyalty and security programs be reviewed and all cases readjudicated under the present standard if the former standard was less rigorous. Such a review may necessitate a new investigation.

If, in the course of any of these investigations, or by any other method, there is developed information pertaining to paragraphs (2) to (8) of the security criteria, or information that the person has been subjected to pressure to commit disloyal acts, the case is referred to the FBI for full field investigation. The FBI does not take cases involving only suitability factors. Further investigation of other kinds of derogatory information will be conducted by the Commission for agencies without facilities on a reimbursable basis.[11]

FBI files are checked in all investigations, agency or full-field. They are likely to produce derogatory information if any exists. The FBI scans the *Worker* and other publications it considers Communist or as having Communist leanings. It files the names of those mentioned as speaker, signer, or contributor in activities which it regards as Communist or subversive. It receives information from its own agents, from other law enforcement groups, from letters, anonymous and otherwise. It files the hearings and reports of the House Committee on Un-American activities. All this, and much more, goes into the file.

The full field investigation, whether conducted by FBI, Commission or military, is a comparatively complete study of the person, within the practical limits of time and money.

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[11] Much legislation creating agencies dealing with foreign aid or with national defense specifically required investigations to be made by the FBI. The Justice Department was swamped and requested a change in the law. Since 1952, the Civil Service Commission has conducted most routine investigations and only derogatory information is sent to the FBI for development.

In addition to the sources covered in agency and inquiries, it may cover credit agencies, minor party affiliations, other records. The investigator goes into the community and interviews the references, friends, neighbors, business acquaintances of the employee. They (the usual practice is to have a two-man team) will inquire into his habits, his opinions, his reputation. There is no precise definition of derogatory information at this stage. The investigating agency will collect and report to the employing agency almost anything which could reflect adversely on the employees, without comment or evaluation. Such a report contains largely derogatory information; the government is looking for danger spots. The FBI makes a summary report; its raw files, which include information on confidential advisors and methods of inquiry, are not available to the employing agency.[12] To protect an informant it considers confidential, the FBI will conceal his name and any data which might lead to his identification. It will evaluate his reliability to the extent of indicating whether he has given information which has been shown correct to the FBI's satisfaction in the past.

There are many delays in the investigative process. An FBI field check takes from four weeks up. A serious backlog may develop. In the State Department, there were at the end of 1953 over 5,500 cases waiting to be processed. Funds have since been reallocated to add investigators.

Security Office Evaluation of Investigative Reports

Each department or agency has a security office, which plays many roles in the clearance procedure. In most departments, the office is part of the administrative services; nonetheless, in its functioning, it tends to be almost autonomous. The office is usually staffed by career employees, with personnel or investigative experience. The Department of Health, Education and Welfare and the State Department have head-

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[12] Attorney General Brownell, in an interview, gave as reasons: the jeopardy to security of disclosure of sources or of investigative techniques, the harm to the innocent, the danger of educating the subversive in ways of evasion, and the fear of drying up sources. Newsweek, April 6, 1953, p. 24.

ing their security forces ex-members of the FBI, Mr. Schmidt in Health and Mr. McLeod in the State Department.[13]

The investigative reports go to the Security Office for preliminary analysis. All such reports go for evaluation in the Veterans Administration, the Post Office, Health and Justice departments. The sample regulations were not clear on this point; one section routed all reports to the Security office for evaluation, another required this only for information under criteria (2) to (8). The Treasury sends all full field reports and any other investigations with unfavorable information of any kind to the Security Office. Presumably, someone down the line must decide what information is unfavorable; but this initially is a mechanical determination. The State Department routes all reports through the Security Office but sends only those with derogatory information to the Administrator, who is responsible for the actual evaluation and recommendation.

The standards to be used by the Personnel Security Office in this evaluation are never discussed in the regulations. Presumably they are similar to the standards prescribed for the decision to suspend.

The civilian agencies make no further provision for the applicant about whom there is derogatory information; he is not processed under the regulations. Presumably the Security Office evaluation of an applicant is given to the employing office, with a recommendation. There is no requirement that the applicant ever be informed why he was turned down. Nonsensitive appointments are made subject to subsequent investigation; hence, the applicant will usually have become an employee before the investigation is made. He is thus afforded the procedural rights granted to an employee in his probational period. The applicant for a sensitive position will in all likelihood still be an applicant when investigation is completed.

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[13] The security officer in the State Department, known as the Administrator, holds a peculiar position. The Bureau of Security and Consular Affairs was created by Congress. Responsibility for personnel was later added to this Bureau. The personnel office was recently removed from the Bureau, but Mr. McLeod remains in control of security, of the Passport Division and of other offices.

The State Department specifies that the Office of Security may conduct or request further investigation, or may develop the information in hand by interview or written interrogatories. The Department of Health, Education and Welfare has similar provisions for inquiry. The regulations of the other agencies are silent on this point and the frequency of use of these pre-hearing devices has not been ascertained. Potentially, interview or interrogatory at this stage can do away with a need for further processing of a simple case and save both the government and the employee expense, effort and embarrassment. Potentially, too, it can be a form of threat, an indication to the employee that charges are forthcoming and that quick resignation would be in order. The value of the device depends not on its intrinsic merits but on the attitude of the department which utilizes it.

The Personnel Officer, under the Sample Regulations, forwards his evaluation and the file to whatever official the agency head has delegated his authority under the Act to suspend employees.

Suspension

The decision to suspend is the responsibility of a high administrative officer, not a security official. It is a rare administrator who would have the time for complete review of all files; the recommendation of the Personnel Security Officer must carry great weight. The Post Office and the Treasury departments allow some scope for decision to be made formally, as well as informally, by the Security office. The Post Office regulations require the Personnel Security Officer to forward the report and evaluation "if he deems suspension advisable" which by negative inference means he may close the case if he feels suspension unnecessary. This implication is further supported by a later section which specifically says that in his decision he is to be guided by the same standards which the suspending authority uses.

The Treasury Department explicitly puts the power to order suspension jointly in a Security Officer and a Legal Officer, who evaluate the reports. They decide what action, if any, shall be taken. If they consider suspension or reassignment appropri-

ate, they notify the head of the bureau who must follow their decision.[14] If they wish, they may call the bureau chief into consultation and abide by the majority decision.

In the Justice, Post Office and Treasury departments, suspension is formally ordered by the heads of component bureaus. The State and Health departments and the Veterans' Administration restrict this power to the head of the agency.

If the officer decides it is not necessary to suspend the employee, a written determination to that effect must be placed in the files.[15] The Sample regulations state that if there are "ameliorating circumstances" which are neither defined nor illustrated, and if the Security Officer approves, the employee may be transferred temporarily to a position where his presence would be consistent with national security. The regulations of the Veterans Administration adopt this provision in the words of the Sample. The Post Office, Justice and Health departments have no equivalent sections. The State Department includes, in a general warning against using the security program to the exclusion of other procedures, a statement that "interim action" should be used to "the fullest possible extent." This could authorize temporary change of position though there is no other mention of it. Since all positions in State are considered sensitive, the practicability of such a transfer can be doubted.

The Treasury treats reassignment as an interim measure open to the Personnel Security Officer and the Legal Officer. An employee who has been reassigned will then receive the

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[14] The Treasury regulations state that one of four actions may be taken, to

1. Retain the employee in his present position.
2. Suspend.
3. Transfer temporarily.
4. To find that continued employment is not clearly consistent with national security.

The fourth item is not a true alternative. If it is found that continued employment is not clearly consistent with national security, a further decision to suspend or transfer temporarily must be made. It is possible that if this fourth item is found, further investigation will be made before the second or third alternative is followed.

[15] This requirement may put pressure on the official to suspend. He may fear that he would be criticized if a future investigation should unearth his failure to suspend.

In the Post Office, whatever the decision, the file is returned to the custody of the Personnel Security Officer.

same notice which an employee of his status would receive if suspended. He may answer in writing and in affidavits. If, considering these documents, the Security Officer and the Legal Officer agree that the case may be closed favorably to the employee, they make this recommendation to the Secretary. If a favorable decision is not made, the Security Officer will order the head of the bureau to suspend the employee. The case is then treated like any other suspension case.

In deciding whether suspension is necessary in the interests of security, the officer should consider, among other things, the seriousness of the information received, the possible access to classified material which the individual might have in his position, and the opportunity to do harm which that position affords. The regulations make no attempt to prescribe respective weight to these elements or to indicate what other considerations might enter the decision.

Disposition Without Hearing

All employees do not have the same rights under Public Law 733. The United States citizen, serving under a permanent or indefinite appointment and past the period of probation, is entitled to an agency hearing; other employees are not.

The probational employee, the alien, the employee hired for a limited period, will be given, within "a reasonable time" after suspension, notice in writing of the suspension. Such notice is generally given in the name of the administrative officer having power to suspend, but some agencies have the Security Officer or some lesser official send it.

The notice is accompanied by a list of reasons for the suspension.[16] The regulations state these shall be as complete as security considerations, including protection of confidential sources, permit. This proviso has been broadly interpreted by the various agencies so that not only the names of informants but the details of the incidents involved may be concealed if it is thought such information might allow identification.

Within thirty days, the employee may submit such state-

[16] These are prepared in most units by the Security Office. In the Treasury Department, they are the joint product of the Legal Officer and the Security Officer.

ments in writing, affidavits or documents, as he wishes, to refute or explain the reasons given him with the notice. These papers are submitted to a Legal Officer, who may be specializing in Security work. The Post Office and the Veterans Administration route the reply through the Security Officer.

The Legal Officer or the Security Officer (both of them in the Veterans Administration) consider the answer for "sufficiency." This term is not defined. The Treasury adds that if the papers are deficient, the Legal Officer may allow correction.

The Personnel Security Officer and the Legal Officer review the file and the reply, if any was made.[17] They make a joint recommendation to the head of the department or agency, or individual recommendations if they are not in agreement. There is no provision in the regulations of civilian agencies for further investigation or inquiry at this stage.

The head of the agency is responsible for reviewing the file and the recommendations made. The extent of the review may vary with the size of the operation supervised, the nature of its security problem, and the personalities of the officials involved. Again, there is no mention of any independent questioning. The officer may make one of three decisions. If he finds that the continued employment of the individual is "clearly consistent" with the national security, he will reinstate the employee and compensate him for loss of earnings during this period. There is no provision for compensation for the expenses of defense.[18]

If he finds that continued employment in the present position is inadvisable, but that another position exists which the employee could fill without danger to security, he may transfer him to this job. This is to be distinguished from the tem-

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[17] The Justice Department requires the Deputy Attorney General, the legal officer in security cases, to consider also the employee's personnel file. This, coupled with the lack of any reference in the Justice regulations to other civil service procedures, might indicate that suitability cases are processed under security regulations.

[18] The costs of defense may be high. The employee should have an attorney. He may have to get copies of various records and documents. He may take depositions and get affidavits. All this may be expensive, and especially burdensome to a man who is suspended without pay. Many employees, it is said, resign rather than fight charges, for financial reasons.

porary reassignment pending administrative action which is in lieu of suspension. Permanent reassignment is at least a theoretical possibility in all agencies. The regulations emphasize that reassignment, rather than removal, should be used whenever possible. There is little evidence of any widespread use.

If there is no position available, or if for any other reason continued employment is not consistent with the security standard, the employee is separated from the department. He receives written notice of this decision from the administrative officer or the Security Officer. There is no appeal. Civil Service regulations for appeal of dismissal exclude security cases.

Charges Preceding a Hearing

The employee entitled to a hearing receives, within thirty days after suspension (as distinguished from "a reasonable time") a written "statement of charges." These, like the "reasons" which other employees get, are required to be as detailed as security allows.

The employee may answer in writing, in refutation of the charges. His documents are sent to the Legal Officer or the Personnel Security Officer, both of whom again consider them for "sufficiency."[19] The Post Office adds that if the Security Officer and the Legal Officer are agreed on a favorable recommendation, a hearing may be by-passed and the recommendation to close the case made to the Postmaster General. The Justice Department makes a similar provision.

The Post Office, State, Treasury and Justice departments state that the employee must request a hearing. Other agencies make no mention of this. They say, following the Sample, that a hearing "shall be given" but presumably one must ask before it will be given.

Hearing Boards

Hearing boards are composed of government employees, picked from a panel to hear a particular case. Agencies nominate their own employees to a roster compiled by the Civil Service Commission and draw from that roster employees of other units when a board is needed. This procedure is a prod-

[19] The Veterans Administration omits any reference to "sufficiency" at this stage.

uct of the regulations; neither the statute nor the Executive Order mention it.

In the Sample Regulations, nominations to the roster in the Washington area are made by the agency's Security Officer. Health and the Veterans Administration reserve this function to the head of the agency. The chief of a field office outside Washington nominates to regional rosters, according to the Sample. Many regulations are silent on this. The Post Office gives still another power to the Security Officer; he makes these field nominations also. The Treasury has the field heads submit nominations at the request of the Personnel Security Officer, who makes the final choice.

Nominees are required to be men of responsibility, "unquestioned integrity" and sound judgment. They have had full field investigations and no unresolved derogatory information exists against them. The Treasury adds that no nominee may be a security officer or an investigator. All nominations must be found to be "clearly consistent" with national security.

At least three members are chosen from this panel. None is employed in the agency conducting the hearing.[20] None may be acquainted with the employee. The military selection differs, as will be shown. Sample Regulations call for the head of the agency to make the selections from the panel. The State Department gives this task to the Administrator, Bureau of Security and Consular Affairs. The Treasury places the authority in the Legal Officer.

Of the agencies sampled, only the Treasury gives the employee the right to challenge a member of the board. The employee has one peremptory challenge and an unlimited number of challenges for cause. Rulings on challenge are made by the Legal Office which, of course, chooses the board in the first place.

A cautionary note should be sounded at this point. The regulations speak of "The Security Officer" or "The Legal Officer" or "The Head of the Agency" performing a function.

[20] It was hoped that this arrangement would eliminate personal prejudice and cut down fear of reprisal from the Security Officer. In defense of the older system in which each agency had its own board, it is argued that outside boards may have little knowledge of the problems of the agency where they are sitting, and that security decisions should consider the position of the employee.

This memorandum follows the terminology of the regulations. It is impossible to ascertain from the regulations the degree of delegation of authority that prevails. It is equally impossible to determine the extent to which an individual Security Officer or Legal Officer follows through the successive steps in a given case.

Conduct of the Hearing

The Security Officer usually prepares the case against the employee. The regulations call for the presence of a Legal Officer at the hearing but what he does and whom he represents there vary among the agencies. The Sample Regulations make him the representative of the head of the department. He aids the board in procedure and legal matters and advises the employee of his rights—but only on the request of the latter. This last duty is not his in the Justice Department. The Treasury gives him the responsibility of assuring that both sides are fully protected. He is repeatedly warned that he is not a prosecutor and is not to act like one. Equally often it is stated that the hearing is a fact-finding procedure and not a trial.

The hearing is opened by reading the charges and the answer, if any was made. The regulations instruct the Board to insure the employee full and fair consideration. Before or after the charges are read, varying with the agency, the Board informs the employee of his right to participate in the hearing, to have counsel, to offer witnesses or other evidence, to cross-examine any adversary witnesses who may appear at the hearing, and generally anything else the Board thinks he may need to know.

The general order of the hearing is controlled by the Board. The employee is allowed to control the sequence of presentation of his evidence. Generally, the agency presents its case first; this is mandatory under Justice rules and customary in other agencies. The department case is presented by the Personnel Security Officer.

The agency need never present a case; in practice, it rarely does. The hearing board has access to the case file and must consider it in reaching its decision. The Board may hear ex parte testimony of witnesses of whose existence the employee

may be unaware. It may consider any documentary evidence in the case—petitions bearing the employee's signature, books, articles and treatises he has written, previous testimony, etc. A statement that such evidence has been considered is included in the transcript, but the evidence itself is not. The agency may rest on the case it has built in the files; the hearing will be treated as an opportunity for the employee to defend himself and for the Board to examine and judge him.

After the agency has made its presentation, if any is made, the employee presents his case. He may call witnesses. He may present documents. He may testify in his own behalf. He gives his case in the sequence he thinks will be most effective.

All witnesses who appear at the hearing testify under oath. However, statements in the file need not be under oath and the board may hear testimony in executive session with or without oath. The Board may call witnesses, but it is not bound by their testimony and may cross-examine them. Even if the agency has subpoena power, it is seldom used.[21] There is no provision for witnesses' expenses.

Technical rules of evidence are not binding; the Board decides what it considers relevant to the issue. Study of transcripts of hearings will show that questioning often goes to political and economic beliefs, and that anything the Board feels has a bearing on the ultimate issue may be brought up whether or not it was contained in the charges.

The hearings are held in closed sessions. The Board is responsible for seeing that the hearing is conducted so that no confidential information is disclosed to unauthorized persons. Such information includes not only classified matter but sources of information or methods of investigation. In Justice Department hearings, the Security Officer confronts the employee only with evidence which in his discretion will not be inconsistent with "or in any way compromise" security. The Board is bound by his advice in all security matters in the hearing. He may preclude pursuing a line of questioning if it might divulge information to the employee.

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[21] Most exceptionally, a few witnesses called by the A.E.C. in the Oppenheimer case were under subpoena.

A verbatim report is made of the hearing. The transcript contains the preliminary papers and the testimony given at the hearing. The Sample Regulations stated that a copy of the transcript could be had by the employee at "a reasonable cost" but this provision was followed only by the Veterans Administration and the Post Office. Generally, the employee gets a copy free.

Decision and Review

The Board makes its decision on the basis of the file and the hearing.[22] Certain guides are given for considering the evidence. The Board is to take into account any handicap the employee may have had through inability to meet charges of which he was not told or to cross-examine or cast doubt on the credibility of witnesses whose names were not disclosed. The Board is also told that if a witness, not a "confidential informant," is called and does not appear, this can be considered; so may the fact that there can be no payment for expenses.[23]

The State Department regulations, as a general guide for all security decisions, establish two presumptions: a former course of behavior is presumed to continue until the opposite is clearly shown, and any doubts are to be resolved against the employee.

The decision is accompanied by a statement of reasons. Both are submitted to the head of the department or agency. They are advisory only.

The Sample Regulations provided that the employee receive a copy of the board decision (though not of the reasons). The regulations of the Health Department omit this provision; the regulations of the Post Office, Treasury and Justice Departments specifically provide against it. The State Department does give the worker a notice of the decision. The Veterans Administration gives the employee a statement of the decision and further (within security restrictions) a statement of the basic reasons for the decision. The Veterans Ad-

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[22] The Justice Department provides that if the employee fails to appear at the scheduled hearing, the Board will consider the case on the record.

[23] "Confidential informant" is never defined. It is not limited to FBI undercover agents or similarly situated persons but may include anyone who does not wish to be identified to the employee.

ministration does not elaborate on what this statement includes and how far beyond a general conclusion it would go.

The entire file, including the hearing record and the opinion of the Board, is forwarded to the head of the agency. (The Treasury Department sends the file though to the Security Officer and the Legal Officer for another review and recommendation); he is supposed to review the entire case. There is no provision for appeal by the employee nor for further investigation at this stage. A written decision is then made, to reinstate, to transfer or to remove, and the employee is notified of this decision. The regulations do not indicate whether the agency head in fact delegates his review.[24]

There is no central review board, as there was under the Loyalty Program. The Civil Service Commission is required under the Executive Order to make a continuing study of the manner in which the program is being operated, to look for deficiencies in security protection and any tendency to deny employees their rights. It is to report at least semi-annually to the National Security Council, with recommendations for revision or legislation. It also furnishes information about any department deficiencies to the head of the department immediately, for such correction as he might make. A small unit in the Commission has been established for this function. A central security investigations index is also maintained by the Civil Service Commission.

In accordance with a presidential directive of 1948, all records and files are to be kept fully confidential to preserve informational sources and to protect the employee. A subpoena or other demand from a source other than the executive branch is to be "respectfully declined" and referred to the office of the President. Access to FBI raw files is given neither to other executive agencies nor to the legislature.

Eligibility for Reappointment

Public Law 733 said that termination "shall not affect the right . . . to seek or accept employment in any other department or agency of the government" provided that the Civil Service Commission determine that the employee was eligible.

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[24] The Veterans Administration provides that the Administrator give, with the notice, the basic reasons for the conclusion reached.

Since the law originally covered only selected agencies, such reappointment was more of a possibility than it is now. The Executive Order shifted the emphasis and added a requirement. The employee will not be appointed in the same or another agency unless the Civil Service determines eligibility and unless the head of the appointing agency finds that such employment is consistent with the national security.

II. MILITARY DEPARTMENTS

The military departments of the government operate three security programs, one for civilian personnel, one for military personnel and one for industrial facilities and their personnel. These programs are not based on the same authority. They do not cover the same areas nor deal with the same problems. Yet, they are alike in spirit, in standards and in procedure.

CIVILIAN PERSONNEL

The program for civilian personnel operates under Public Law 733 and Executive Order 10450. In 1953, the Defense departments employed 1,148,745 out of a total Federal Government employment of 2,302,932.[24a]

The Defense Department issued a general directive and the constituent departments issued regulations governing their own forces. The regulations are highly detailed. They prescribe administrative steps far more elaborately than civilian agency regulations do. Military channels are carefully preserved. Nonetheless, the programs are basically the same as those under which civilian agencies operate and only the differences need be emphasized.

Criteria

The Defense Directive criteria include all those of Executive Order 10450 but add these refinements:

> "8. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 5 above [subversive organizations] when his personal views were sympathetic to the subversive purposes of such organization.
>
> "9. Participation in the activities of an organization with

[24a] The Defense Department includes the departments of the Army, Navy and Air Force and the Office of the Secretary of Defense.

knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of or sympathetic to the infiltrating element or sympathetic to its purposes.

"10. Participation in the activities of an organization, referred to in subparagraph 5 above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

"11. Sympathetic interest in totalitarian, Fascist, Communist, or similar subversive movements.

"12. Sympathetic association with a member or members of an organization referred to in subparagraph 5 above.
(Ordinarily this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

"13. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs 2 through 11 above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

"14. Close continuing association of the type described in subparagraph 13 above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

"15. The presence of a spouse, parent, brother, sister or offspring in a nation whose interests may be inimical to the interests of the United States or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives.

"16. Willful violation or disregard of security regulations.

"17. Acts of a reckless, irresponsible or wanton nature which indicates such poor judgment and instability as to suggest that the individual might disclose security information to unauthorized persons or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the security of the United States."

Items (8) to (14) may be considered as an elaboration of paragraph (5) of Executive Order 10450, sec. 8, or perhaps they create independent grounds for rejection. (15) is the

classic example of 1(v), the pressure risk. Making it a separate category may divorce it from the limitation of (1) that it be weighed according to the position of the employee. (17) can be encompassed in 1(i), but the separate expansion may indicate some special import to the Defense Department. (16) merely makes a separate class of what was a phrase of (6) in the Executive Order.

The directive recognizes that because of this enumeration and elaboration on the basic criteria, all the classes are not of the same "seriousness." The regulations of the military departments do not follow these criteria precisely, but the variations are unimportant.

The departments do not limit subversive groups to those on the Attorney General's list. That list is set forth in the loyalty certificate for military personnel and the similar certificate of non-affiliation for civilian personnel; but the employee is apparently expected to disclose any subversive affiliation, whether or not the organization is on the list. Failure to disclose membership is itself grounds for charges. The list is posted conspicuously at all military establishments.

The regulations, furthermore, specifically indicate that nonlisted organizations may be considered, though the Air Force notes that the Attorney General has advised that "mere" membership, affiliation or association with an organization not designated by him should not be considered relevant unless the department obtains and makes available to the adjudicator the Attorney General's views on the organization. There is no indication, however, that other departments follow this advice. The Navy permits the citing of organizations mentioned by other government agencies if there is information available sufficient to evaluate it.

The military regulations all refer to the Attorney General's statement that membership in an organization is only one factor to be considered. The Navy and the Air Force counsel the adjudicator to consider the employee's reasons for joining the group and his knowledge of its purposes.

The Defense directive quite clearly states that these regulations should be limited to true security cases. Maximum use is to be made of normal civil service removal when security is

not a consideration and the procedure is adequate and appropriate. This is repeated by the constituent units. However, both the Army and the Navy indicate the reverse implications of this provision. If the information is not of a status to sustain civil service action, it will be processed under security regulations. The Navy adds that action may be taken through suitability procedures even if the security decision was favorable.

Categories of Sensitive Positions.

The Defense directive distinguishes three types of position, two sensitive and one non-sensitive. The definition of "sensitive" is not changed. However, a separate category is established, consisting of those responsible for war plans and policies, for over-all defense programs, and certain other sensitive positions. The Army calls this top sensitive classification "sensitive-critical" and includes in addition to those mentioned all having access to Top Secret classified matter, all grades above GS-14, and all members of screening and appeals boards. The Navy includes in top sensitive all having access to any classified matter. The bottom sensitive group consists of all other positions which are designated sensitive.

The Air Force has three sensitive levels—the war plan level, a second level including those with access to Top Secret, cryptographic or security clearance material, and a third level which includes those having access to Secret or Confidential matter, those training personnel, and those in public relations. Included also in this lowest level are those working in areas which contain classified matter (but who are without authorized access to it), and who have a real opportunity to commit sabotage or espionage.

It was brought out in hearings of the Senate Committee on Armed Services, July 15, 1954, that some incumbent employees and all applicants for Army employment are now required to execute a certificate of non-affiliation with certain organizations. Incumbents in sensitive positions must sign. If they refuse or invoke the Fifth Amendment, they are deemed a security risk. Applicants for any position not exempted from investigation must fill out this form. If they refuse or invoke

the Fifth Amendment, they are denied employment. If they complete the forms and the information given raises a security question, appointment will not be made prior to a national agency check.

Investigations

Investigation in the military departments, as in civilian ones, starts from the personnel forms and varies in intensity with the sensitivity of the position filled and the nature of the information developed. Non-sensitive appointments are, as in civil agencies, made subject to agency check and written inquiry. The Army excepts appointments under six months and aliens employed overseas. The Air Force regulations require only a check of employees references and local agencies for temporary or seasonal employees under three months. If derogatory information is developed in any of these cases, the investigation is extended.

The top sensitive appointments are made only after the completion of what the defense departments call a "background" investigation, which is approximately the equivalent of a full-field investigation.[25] An emergency appointment may be made but at least a satisfactory national agency check must first be completed. A national agency check is required before appointment to other sensitive jobs and the appointment is subject to the satisfactory completion of the background investigation. In emergency, the position may be filled by one on whom no check has been made. The Air Force regulations are substantially similar but a lot more intricate.

Incumbents of sensitive positions are subject to full field investigation but may continue to occupy their positions pending completion. The Air Force requires only a national agency check for the lowest sensitive group of incumbents. The Army allows past investigation to suffice for present clearance if it meets the present requirements. Of course, under the Executive Order, cases previously investigated are re-adjudicated by the present standard. The Defense departments operated

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[25] A neighborhood investigation is not generally made except to prove or disprove derogatory information developed in other ways.

A great emphasis is placed in background investigation on citizenship status and on foreign travel and connections.

both loyalty and security programs during the Truman administration so that this provision should have little practical effect.

The Directive is silent on procedure; it refers the departments to Public Law 733. As the regulations were developed, each department uses three levels of boards, a security screening board at a pre-charge stage, a hearing board, as required by the statute, and a review board, which affords the employee an appeal after hearing, a development peculiar to the military departments.

Disposition of Applicants

The civilian agencies, it will be remembered, have no formalized procedure by which an applicant can appeal. The situation under the armed forces regulations is more difficult to ascertain and the practice is not uniform.

The Army is silent on this point. There are detailed directions for handling the files after a determination has been made, but no hint of what happens before. The Navy provides that all cases in which an FBI full field investigative report is received are referred to the activity Screening Board. This would include all cases in which derogatory information dealing with subversion was developed. A Screening Board may request further investigation, an interview, etc. These powers are given to the Board in all cases; hence, they are available when the Board handles an application. The Board makes a recommendation to the head of the activity who makes the final decision. There is no appeal from this decision.

The Air Force states that the appropriate military Command on receiving the investigative report may decide that the applicant should not be appointed. If, notwithstanding the presence of derogatory information, he feels the appointment should be made, he may do so if it is to a non-sensitive position. If the position is sensitive, the case must be processed. Whatever the determination, all reports of derogatory information are forwarded to the Central Security Board, with a statement of the action taken. The Security Board reviews all cases, may issue interrogatories, have investigation made, etc. It may in its discretion grant a hearing to the applicant.

Evaluation of Reports—Army

Derogatory reports come to the installation or command of the Army. A decision is made whether to continue employment. Additional investigation may be made. Suspension occurs at this point only if security warrants it. The file is forwarded to major command headquarters, within three days if the employee has been suspended. The major command makes a determination and a recommendation and forwards to the command echelon or G-2, depending on the position of the command. The head of the service of the Army having command will review, make recommendations, and forward to G-2.[26]

G-2 will then review. It may make further investigation, issue interrogatories, return the case to the major command for an interview with the employee, or recommend suspension or revocation of clearance, if this has not already been accomplished. If the decision is to end employment, the case is sent to the Screening Board which is in the Office of the Secretary of the Army. A recommendation and rationale accompany the file and if the recommendation is adverse, a suggested list of charges is included. The Board reviews the case and makes a recommendation to the Secretary. It, too, may prepare interrogatories, direct an interview or further investigate. If the recommendation is favorable, G-2 may concur. If it dissents a detailed rationale for non-concurrence is required. If the recommendation is unfavorable and approved by the Secretary, the Board draws up the charges.

Evaluation—Air Force

The Air Force procedure is similar. Reports are transmitted to the Commander through the Director of Special Investigations, who also forwards a copy to the Central Security Board. He may recommend to the latter that the employee be suspended before sending the file to the installation.

The Commander makes his determination. If it is to retain, he so states with reasons. He may suspend. However, interim action, such as a change or a restriction of duty, is preferred.

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[26] At any time before a letter of charges is issued, the commander may end suspension. Only the Secretary of the Army may authorize payments for the suspension period.

Before suspending, "to avoid unwarranted or premature suspensions" and to "ensure the orderly processing of cases" the Commander must contact the Executive Secretary, Civilian Personnel Security Program, at Headquarters in Washington. If the employee is suspended, he receives a copy of the regulations and is told he will get charges or instructions from the Board. At the time he is suspended, the Executive Secretary must be notified, a description of the position occupied forwarded, and a statement made why interim action is not sufficient to safeguard security. Whatever action is taken, the file is forwarded, with the recommendation, to Special Investigations at Washington. It must contain information as to whether it is practicable to reassign the worker to another, non-sensitive position on a permanent basis.

The Director submits this file with his recommendations to the Central Security Board, with a summary of facts.[27] The Board reviews the case, making investigation or interrogation as needed. It may recommend favorable finding, further investigation, processing to removal or other administrative proceedings.

The Board may direct suspension or it may restore a suspended employee to duty. It is required to take into consideration not only the usual security needs but "the fact that an unwarranted or premature suspension may result in needless effort or embarrassment on the part of the employee or the Air Force." If it decides adversely to the worker, it will prepare charges and a notice informing him of his rights. Normally, suspension occurs at this time.

Evaluation—Navy

The Army and Air Force have central screening boards which act as a check over the Commander's decision. The Navy puts greater power in the hands of the Commander. A screening board is appointed by the head of each activity and handles only the cases of that activity.[28] In small activities the Commander may dispense with the board.

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[27] This Board has at least three members. One is from the Inspector General's office, one from Personnel, and one from Judge Advocate or the General Counsel's office.

[28] This is composed of three employees of the activity. Preferably, two should be civilians.

The board, if one exists, reviews all cases in which a full field report is received and all cases formerly adjudicated under 9835. It may direct further investigation. It may request advice on the reliability of confidential informants from the FBI. To clarify minor points prior to recommendation, the employee, if he so desires, may be given written interrogatories. These are not to be used to confront the individual with seriously derogatory information. The Board may interview any local personnel, including the employee. It makes a recommendation to the activity head but he makes the decision. However, if he disagrees with the board, he must include his rationale in the file.

Disposition Without Hearing

The Navy states that an appointee, defined as an employee who has not completed twelve months of government service, may be separated administratively. Administrative separation is not defined; it would presumably have to meet the requirements of Public Law 733, however. An "incumbent" who is an employee past probation period is furnished with charges.

The Army gives in a six-line paragraph the procedure applicable to the employee not entitled to a hearing. Cases of appointments of under a year are not ordinarily processed through security regulations. Their contracts are simply not renewed and no reference is made to security in the termination. The undefined status of the Navy appointee has been indicated.

The Air Force is as brief as the Army on these cases. However, it allows all employees and even applicants hearings at the discretion of the Central Security Board. The regulations suggest that a hearing should normally be granted.

Hearings; Boards

If a hearing is requested, a board is convened. The Army provides that the Executive Secretary of the hearing board will schedule a hearing even if no request is made and the employee will be notified of the time and place. The Navy provides that if no reply is made, the head of the activity will

consider the case, no presumption being made against the em ployee for failure to respond. This would seem a formal step the Commander has just decided to suspend and no new in formation has arisen. If there is a reply, but no hearing i requested, the head will consider the case. He may, in his dis cretion, schedule a hearing, again with no presumptions drawn if the employee fails to appear. The Air Force forwards the file, with or without answer, through the Review Board if no hearing is requested.

If an Army employee requests a hearing, the Executive Secretary of the hearing board will review the file. If his opinion is favorable, an advisory panel of the Board will be named. If it concurs, it may meet formally in executive ses sion and submit a recommendation to the Office of the Secre tary, Administrative Assistant. The employee will be given no notice of this hearing unless he should happen to inquire

By an agreement approved by the Department of Justice the military departments supply each other with hearing board personnel. In the Washington area, an official roster is kept by the Defense Department. In continental United States and the territories, the boards are also drawn from the other military departments. Overseas, and in isolated areas any where, boards are taken from the employees of the installation and may therefore be composed of members of the same de partment as the employee being heard. Board members are chosen from the highest ranking personnel available.

The boards are composed of military and civilian personnel A majority must be civilian. The Army and Navy provide for an Executive Secretary of the Hearing Board who is in charge of all administrative details of the hearing. The Executive Secretary is a civilian employee, appointed by the Commander The composition of the Board will vary from case to case but the Secretary is permanent. The regulations require that, if possible, he be someone who was connected with the old loyalty security program. He must meet the background investigation qualifications of the Board but not the grade requirements The Executive Secretary in the Army selects the Board for the

hearing. In the Navy, he does the same in the name of the activity head.[29]

Each member of the Board studies the file prior to the hearing. The Air Force warns them that this is only one side of the case and judgment must be reserved. The Naval Board may consult with Intelligence on the reliability of confidential informants and the method by which information is obtained. They must be informed of the nature of each organization which may figure in the case.

Conduct of Hearings

The departments provide for a Legal Advisor to aid the Board in examination and in procedure. The Air Force provides that if the employee appears without counsel the Legal Advisor is to inform him of his rights and aid him in points of procedure. This does not relieve the Board of its duty to advise. The Navy states also that if the government has an attorney handling the case, he may examine in aid of the Board. The Army has an optional JAG representative and a Security Advisor to the Board. The latter may question only through the Board.

In most essentials, the hearings do not vary from civilian agency hearings. The regulations are a good deal more detailed, however. Instruction is given in how to weigh evidence, what to consider, etc.[30] The boards are warned in general

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[29] The Executive Secretary maintains liaison with the Civil Service Commission and the other military establishments in the area to ensure that a panel is currently available. He takes care of travel orders for the members of the board, transmits invitations to witnesses, arranges the physical and temporal details of the hearing, gets clerical aid to the Board, makes sure files don't go astray, sends them along to the next stage, etc.

In the Air Force, the Board sets the time and place for hearing.

[30] The Navy instructs that documentary evidence is accepted as reliable unless the employee furnishes clear proof to the contrary. A denial raises a question of credibility.

In evaluating a witness' testimony, the Board is to consider how well he knew the employee, that their relation was, when he knew him, and any motive he might have for testifying.

The demeanor of the employee, his evasiveness or cooperation, the consistency of his current answers with past representations are factors. Misrepresentation is itself grounds for dismissal.

The Air Force cautions that derogatory information is to be weighed by recency, relative seriousness, the attendant circumstances, the relevancy to the charges, the supporting independent information, whether it was given under oath, and the opportunity the employee had to rebut.

to protect confidential sources and are specifically told not to ask questions which might reveal information. They are also warned away from irrelevant questioning and constitutional arguments.

It is standard practice in the military departments to send an invitation to all witnesses who have given adverse information and who have not indicated that their identity was to be kept confidential. A witness may testify at the hearing or in private before the Board. He is asked if his statement or his name may be given to the employee. If he does not appear, his testimony may still be used, but his non-appearance should be weighed. There is the usual provision about taking into account the employee's handicap by non-disclosure.

Decision, Review and Appeal

The Board then makes a finding, a decision in writing and a memorandum of reasons. The Air Force regulations require a finding to each allegation and an analysis of the information and the reason for the finding. The Air Force further provides that the Board may advise reassignment if there is a suitable vacancy and the Commander approves.

The file is forwarded to Washington for post-hearing review and appeal procedure. The Army and Air Force Boards review all cases; the Navy Board considers appeals and other cases on its own motion. The employee may file briefs or papers when the decision of either board is adverse. All review boards consider additional written evidence and briefs.

The review boards make a recommendation to the Secretary, who makes the decision. A favorable decision acts as a clearance for the employee to have access to classified information on a need-to-know basis. The provisions for lost pay, the prohibition against rehiring, the reports to the Civil Service Commission, the confidential nature of the files, are covered sketchily, but the provisions of the Executive Order apply.[31] The Navy Department will on inquiry about an employee sep-

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[31] If the employee resigns while charges are being processed, his records will bear this notation.

The Army provides that once the employee is suspended and charges have been made, separation under other procedures, such as reduction in force, is held in abeyance.

arated for security reasons state only that he was separated for unsuitability.

MILITARY PERSONNEL

Security programs for military personnel have been in operation for more than six years. In 1948, a joint memorandum of the departments forbade the enlistment or appointment into the armed forces, without the approval of the department, of one who "admits" or is otherwise believed to have engaged in disloyal or subversive activities. In 1949, another memorandum ordered that inductees who refused to execute loyalty oaths and others suspected of subversion were to be denied access to classified material and to be kept on duty under surveillance. A system of discharging security risks developed, with no statutory authorization other than the general disciplinary powers of the armed forces.

The public was informed of some of the mechanics of the system at the hearings of the Senate Committee on Armed Service to revise the Doctor Draft law, March and April of 1954. The Department of Defense then issued a public memorandum. Pursuant to this, the military departments released revised regulations in 1954.

Criteria

The criteria adopted by Defense for military personnel are substantially the same as the criteria applied to civilians,[32]

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[32] The Defense Department criteria are:

"a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

c. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

except that they omit "sympathetic interest" in subversive movements (short of membership). The suitability criteria are included; but it is directed that they be processed under non-security procedures if not combined with security cri-

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d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted or shows a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (An organization, movement, or group officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of Government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established.)

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interest of another government in preference to the interests of the United States.

f. Failure or refusal to sign loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, in refusing to completely answer questions contained in DD Forms 98, 390, or 398; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

teria.[33] The Defense Department regards violation of security regulations as a matter of discipline rather than of security and includes it in this second category. The constituent departments made no departures from these criteria.

Volunteers

The Defense directive states that no one reasonably believed to have engaged in any of the listed activities at any time may be appointed or enlisted in the armed forces without the approval of the secretary of the department. A volunteer fills out the standard loyalty certificate (DD 98) to which is attached a list of the organizations on the Attorney General's compilation. In addition to general questioning about subversive activities, the certificate requires one to indicate the extent of his participation in any named organization, including not only membership but attending meetings or social gatherings which the organization sponsored. If the form is not completed, the application is denied. If from the form or otherwise, there is reason to believe the applicant is ineligible

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l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 2 below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States

Category (2), which is normally processed under other regulations.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy."

[33] The Defense directive states that the security regulations are an administrative procedure which does not preclude trial by court-martial when appropriate or separation on non-security grounds.

The Air Force requires the Commander, when recommending suspension, to state that other action was considered and found inappropriate.

under the criteria, the case will be forwarded to a designated personnel or security officer for processing. There is no appeal. The volunteer serviceman has a position like that of the applicant for civilian employment.

Reserve officers going on active duty must also complete the form. If the entries made give rise to a security question, and he is a volunteer, the army will treat him like other volunteers; if he is involuntarily recalled, his case will be processed through the channels to be described below. The Air Force processes both types of reservists through regular procedures.

The Navy will make an interim assignment and an investigation. It may put the suspect reservist in active duty, court-martial him when appropriate, or release him. If the disclosure or refusal was made with intent to avoid duty, the Navy may retain him on restricted activities and subject him to discipline for this act under the Uniform Code of Military Justice.[34]

Conscripts

The conscript and the drafted doctor raise major new problems. Civilian personnel and volunteers, it will be recalled, are retained only if retention is "clearly consistent" with national security. There is, however, some danger of draft-dodging. The military fear that a person subject to call may refuse to execute the certificate or fabricate derogatory information to avoid service. Hence the milder standard applied to the inductee, which reverses the emphasis of the civilian standard: the conscript will be retained unless there is sufficient derogatory information to require discharge. The other novel element in this situation is that the conscript's involvement with a security program is involuntary.

Inductees are now required to complete the loyalty certificate before entering the service. A known Communist or subversive will not be inducted. If the inductee refuses to execute the certificate or reveals significant derogatory information, he is accepted and, pending investigation, is retained in the lowest enlisted pay grade in a non-sensitive position. There

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[34] A national agency check is now made of all officer candidates and reservists considered for recall.

can, however, be no permanent assignment to such restricted duties without adjudication under these regulations.

If the inductee refused to execute the certificate and if investigation and processing reveal that retention is inconsistent with national security, he will be discharged with an undesirable discharge. If there is derogatory information insufficient to require discharge, he will be retained in service under controlled conditions and the ultimate discharge will be based on the service he has rendered.

If investigation shows that retention is inadvisable but no information is developed which the individual did not reveal on his questionnaire, he will be given a discharge commensurate with the services rendered. If there is less serious derogatory information, he will be retained in whatever assignment is appropriate, and the discharge will be based on behavior in service.

A slight variation is involved in the special draft of doctors and dentists. Those who fail or refuse to meet the security standards are denied a commission. They are referred to selective service for induction as enlisted personnel. An investigation and a determination will be made within ninety days if possible and in every case within six months. If the individual is held a security risk, he will be released with a discharge so stating, unless the fact causing this determination is beyond his control. If no risk is involved, he will be offered his commission if otherwise qualified. If there is doubt, he will be retained in enlisted status and used in his professional capacity under security restrictions.

Types of Discharge; Retention in Controlled Duties

It has hitherto been the policy of the armed forces that discharge should reflect only the quality of behavior in the service. There are five classes of discharge, for other than physical or mental reasons: honorable, general,[35] undesirable, bad conduct, and dishonorable. The honorable, the general

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[35] The general discharge is given for the same reasons as an honorable discharge. The conduct is satisfactory but not sufficient for an honorable discharge.

The general discharge may also be granted when separation is for inaptitude and unsuitability.

and the undesirable are administrative discharges; only a court-martial can give a bad conduct or dishonorable discharge. A regular officer, with over three years' service, can be given a discharge under other than honorable conditions only by sentence of a court-martial. Doubt as to retention is to be resolved against the serviceman; doubt as to the type of discharge is to be resolved in his favor.

All officers and warrant officers are deemed to hold sensitive positions by virtue of their commission, regardless of their assignment. Non-commissioned officers are generally considered sensitive. Any position which requires access to classified information is of course sensitive. Hence, the serviceman who is retained in controlled conditions because there is derogatory information insufficient to warrant discharge is likely to be held to the lowest level of military life.

Investigation and Evaluation

Investigations for the Army are conducted by Army staff and instituted at the major command level for military personnel. When a report is made on information raising security implications, the commander makes a recommendation to the major command and takes any action necessary to protect security in the meanwhile. At this point, the commander will also institute what is known as "flagging" procedure. All official personnel files are marked to show that action is being taken by intelligence personnel which would preclude favorable action or change without the prior approval of the Department.[36]

When investigation is completed, a recommendation will be made to the major command. The case may be closed favorably by the major command. If an unfavorable determination is made, the recommendation is forwarded to the Security Division of G-2.

G-2 may direct an interview or further investigation; interrogatories to the serviceman are frequently issued by G-2. The case may be closed favorably or recommendation may be made for removal or restriction procedures. The case is then sent to a screening board of field officers. This board, too, can

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[36] The Air Force has a similar practice.

recommend further investigation, court martial, elimination, discharge under other regulations, or retention in controlled duties. A favorable recommendation is sent to the Review Board. If a recommendation to discharge or hold in controlled duties is made, a Letter of Allegations is prepared and delivered. The parallel to the stages of civilian personnel procedure is clear—the command, the major command, the board at the department level.[37]

In the Air Force, derogatory information coming to the Commander is sent on for investigation, interim action being taken if needed. On receipt of the investigative report, the Commander makes a determination. He may close the case, if the decision is favorable, or he may recommend removal.

All cases, including those of inductees and applicants, are reviewed by the Director of Special Investigations and then by the Military Personnel Security Committee.[38] The Committee may interrogate or request further investigation. It then makes its recommendation. If favorable, the case is closed. If not, a notice and a statement of reasons is delivered. Here, too, the channels parallel the civilian personnel process.

The Navy channels are more difficult to follow. Initial processing of all cases, including applicants, may be by the Chief of Naval Personnel or a Bureau or Headquarters Security Board. The Board is composed of three or more officers who "variously function as initial, intermediate, or final administrative processing bodies, and as intermediate and final review boards." It makes a recommendation to the Chief of Personnel who in turn makes the decision.

If the determination is adverse, the Chief will obtain from Intelligence a narrative statement of fact as disclosed by the investigation; written interrogatories are drafted to allow the individual to explain or refute the charges of the narrative.

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[37] The Defense directive and the regulations warn that action to warn suspects must be avoided. Before processing under these regulations Intelligence must be consulted. If processing would endanger another current investigation, the serviceman will be retained for the time.

[38] This is composed of three officers, a colonel and two lieutenant-colonels. One is from Judge Advocate, one from Provost Marshal, and the third from Personnel.

Charges and Hearing

When charges are delivered, the serviceman has the option to retire (if he is eligible) or to apply for a discharge; but he must agree to accept an undesirable discharge. The final nature of the discharge is in the discretion of the service; it may be under honorable conditions; it may not. The Navy allows a statement to be submitted showing why a higher discharge should be granted.

Alternatively, the serviceman may answer the charges in writing and request a hearing before a board. The period for answering is short, not more than fifteen days. The Navy is strict in granting extensions, the Air Force, liberal.[39]

Army and Air Force field boards are composed of field grade officers, all senior in temporary and permanent rank to the serviceman. The Navy requires only that they all be officers. If the defendant is in the reserves, the Army requires one, and the Air Force and Navy a majority, of the Board, to be reserve. If the defendant is a woman, a woman officer sits, but (in the Air Force) only in an advisory, non-voting capacity.

The serviceman is furnished military counsel if he desires. He may have civilian counsel, at his own expense. The Board will aid in procuring witnesses, if he needs assistance. The atmosphere is nonetheless more adversary than at a civilian hearing. The order of presentation is more rigid and like a trial; the Navy specifically grants opening, rebuttal and closing to the recorder who presents the department's case. In most other respects, the civilian and military hearings are the same.

Decision and Review

The Board then makes a finding, in detail, with an opinion. It recommends what action is to be taken, advising as to retention or discharge and the type of discharge. The Army, with the problem of the inductees, adds the alternative of retention in controlled condition. The Air Force allows the lowest grades

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[39] The Navy will grant extension only for serious illness or for unique evidence and other extraordinary circumstances.

of airmen to be retained and assigned to non-sensitive positions.[40]

The convening authority in the Navy may review the record and return the case to the board for revision or clarification. He may not direct new findings. He then transmits the file to the Chief of Personnel who sends it for further review to a Bureau or Headquarters Security Board. Final decision is usually made by the Chief. However, he may forward it to the Secretary of the Navy to determine, with or without a further review by a Department of the Navy Security Board. This Board is to be consulted only when there is dispute among members of other boards and/or other authorities.

The Army and Air Force inform the serviceman that he may further appeal his case by brief, arguments and additional evidence. The Review Boards may request further information and may call the defendant to appear. The Army Review Board then directs action. The Air Force has a legal review by the Judge Advocate General and a decision by the Secretary. If the decision is favorable to the serviceman, he is cleared for the position and for the access to classified material it requires. Clearance is for the job involved and not merely for retention in service.

If the decision is to discharge the serviceman, the discharge is based on the gravity of the reasonably substantiated derogatory information, whatever the character of the services rendered. If the serviceman is a conscript who revealed fully derogatory information on the loyalty certificate he will receive a discharge based on the service rendered. Doubt as to the nature of the discharge is to be resolved in favor of discharge under honorable conditions.

In each department, there is a Board of Review of Discharge and Dismissals and a Board of Correction of Military Records. Neither operates under the Uniform Code of Military Justice nor under the security regulations. They are, however, available for security cases. The boards of discharge review are composed of civilian officials chosen by the

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[40] Indefinite assignment to these controlled positions needs the approval of the Secretary. It cannot be extended beyond the current term of enlistment. The serviceman may not re-enlist without department permission.

Secretary of the constituent departments. They meet at Washington, unless otherwise designated. They do not review courts martial. They handle administrative discharges, on appeal or on their own motion. An appellant may appear in person or by counsel. The boards cannot revoke a discharge, but they can amend its nature.

When any proceedings—dismissal or rejection—are taken under these regulations, the Civil Service Commission and the Federal Bureau of Investigation are notified. Thus, future employment in government or defense is unlikely. There are the usual provisions for secrecy of files.[41] The Defense Department gives no access even to other departments with security programs without the prior approval of the appropriate secretary.

The separated serviceman is not allowed to re-enlist without the approval of the Secretary of the department. If his discharge is an undesirable one, he will be limited in the benefits which, as an ex-serviceman, he would otherwise receive.

DEFENSE CONTRACTORS PERSONNEL CLEARANCE

The military departments operate a third security program, this one affecting nearly three million private employees. All industrial facilities utilizing classified information must be cleared through the contracting department.

Since 1950, about 20,000 plants and 500,000 employees have been cleared for Top Secret, Secret and some Confidential information. In addition, about two million employees have been granted access to Confidential material. The size of the program may be judged by the estimated 200 facilities and 4,000 employees cleared monthly. Six hundred and eighty-eight persons have been denied clearance in a four-year period up to July 15, 1954.[41a]

Each plant seeking a government contract utilizing classified

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[41] The military departments classify as confidential all personnel security records and documents of a disciplinary nature, disclosure of which could be prejudicial to discipline and morale.

Information will be released only on a determination that the request is based on a legitimate interest and the release will not prejudice the public good.

[41a] Statement of Secretary of Defense Wilson before the Senate Armed Services Committee, July 15, 1954.

matter must have its physical set-up and its important personnel approved. A foreign owned, controlled or "influenced" company is not eligible for clearance. An inspection is made of the premises. Investigation is made of officers, directors and the key employees who will have access to classified matter for preparing bids. A facility denied clearance on physical elements has no appeal. A denial because of personnel may be appealed to the Appeals Division of the Board. A security agreement is made part of the contract.

Investigation

Personnel are cleared according to the category of information they will need to receive. Since investigation is ordinarily not begun prior to employment by the facility, an interim clearance is granted. Clearance is made by the military department having security cognizance of the facility, or by the management for the lowest level of security information (Confidential).

For Top Secret, a background investigation is required. For Secret information, an American citizen needs a national agency check; an alien must have a background check.

Officers, directors and key employees requiring access to Confidential information are given an agency check. Aliens must have a background investigation.

All other citizens with access only to Confidential material at the facility are cleared by management in the absence of derogatory information. Many facilities have therefore had to establish investigative staffs of their own or utilize detectives and credit agencies. A review is made of personnel records. Checks are usually made at credit bureaus and police files, verification made of past employment and the like. FBI information is not available directly but it may come through the military department.

Denial of security clearance need not mean dismissal from the company. The military department by its contracts requires only that the employee be kept from classified material and from areas where classified production is carried on. But dismissal may often follow for a variety of reasons.

Evaluation

If the military department thinks clearance should be denied or revoked, the case is forwarded to a Screening Division of the Industrial Personnel Security Board. There are three Boards in the United States. The Eastern is under the administration of the Army, the Central of the Air Force, and the Western of the Navy. The appropriate commander appoints an Executive Secretary, a Security Advisor and a Legal Advisor to aid the boards. The boards are authorized to convene at any military establishment in the area. Each Board has a Screening and an Appeal Division.

A company may not revoke a clearance once granted, though it is free to transfer or dismiss the employee on its own initiative, subject to its obligations under collective bargaining or other contracts. Any derogatory information must be submitted to the security office of the military department in charge of the facility. The military department may revoke clearances in exceptional cases but it must forward the case immediately to the Screening Division with an explanation of the action.

The Screening Division (three members) reviews the case. If the determination is unanimously favorable, clearance is granted. If not, in collaboration with a Security Advisor and a Legal Advisor, a notice of denial or revocation and the reasons for the action are prepared. This, and a copy of the regulations, are sent to the contractor or employee, as the case may be. He may answer, within ten days, in writing and under oath.

The file is then considered, with any answer given. Again unanimity is required to clear. If it is not attained, the clearance is denied or revoked. The employee (or the contractor, if the clearance for the whole facility is in question) may then appeal to the Appeals Division, in writing or at an administrative hearing.

Hearings

The Appeals Division (also three-man) must include at least one attorney and one civilian and the Chairman must be a civilian. Hearings are conducted like the hearings the military

departments conduct for civilian employees. Decision is by majority vote and includes a finding as to each allegation. Decision is subject to no review, but the Appeals Division may reconsider the case on its own motion, or on appeal from either side.

The criteria are the same as those in the defense directive for civilian personnel. With respect to paragraph (1) (suitability criteria) the qualifying phrase "the relation of the employment to the national security" is missing. Since all these cases deal with classified matter, all the positions involved are "sensitive" by definition. Hence, the change is probably without significance.

Though the directive does not provide for review, apparently the military department concerned can effectively intervene. The Navy recently suspended the clearance of Dr. E. U. Condon and returned the case to the Industrial Review Board for "reconsideration" (N.Y. Times, Oct. 22, 1954).

III. ATOMIC ENERGY COMMISSION

The military department clearance of defense facilities and personnel rests largely on its contracting power. The Atomic Energy Commission program rests on specific statutory authority as well as contractual control. It uses exactly the same procedure for its own personnel and that of its contractors. Since the inception of the atomic energy development program, the Commission's work has been done largely through contracts with private companies.

The Act authorizes the Commission to make arrangements for research, to contract for special nuclear materials to be produced with government facilities, and to license commercial and medical research and development of atomic energy. The person with whom such arrangements are made must agree to permit no one access to "restricted data" without investigation of his "character, associations, and loyalty". "Restricted data" is the equivalent of "classified information". All AEC employees must have similar clearance. The President may direct that investigation be made by the FBI of some or all groups of employees or contractors, and the Commission may certify specific positions of particular sensitivity to be handled

by the FBI. If a Civil Service Commission investigation develops data reflecting on loyalty, the CSC refers the file to the FBI for full field investigation.

The AEC received the authority, in 1954 amendments to the Act, to establish the standards for the investigation and to specify the scope and extent of investigation to be made. It will be based on the location of the work and its nature, and the importance which the restricted data to which access is granted has for the national security. Previously, a full background investigation had to be made for everyone with access to any level of restricted data.

The standard in the present regulations, dating from 1948, is phrased in terms of danger to the common defense or security. The precaution is included that weight must be given to favorable information. A balance is to be made of the possible risk the person represents and the cost to the program of not having his services.

Criteria

The criteria are in two categories. Information in Category (A) creates a presumption of security risk. Category (B) is composed of derogatory information "where the extent of activities, the attitude, or conviction of the individual" must be weighed in determining whether a presumption of security risk exists.

The Criteria include:

"(A) Reasonable grounds to believe that the individual or his spouse has

"1. Committed or attempted to commit or aided or abetted another who committed or attempted to commit any act of sabotage, espionage, treason, or sedition.

"2. Established an association with espionage agents of a foreign nation; with individuals reliably reported as suspected of espionage; with representatives of foreign nations whose interests may be inimical to the interests of the United States. (Ordinarily this would not include chance or casual meetings; nor contacts limited to normal business or official relations.)

"3. Held membership in or joined any organization

be totalitarian, Fascist, Communist, subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means, provided the individual did not withdraw from such membership when the organization was so identified, or otherwise establish his rejection of its subversive aims; or, prior to the declaration by the Attorney General, participated in the activities of such an organization in a capacity where he should reasonably have had knowledge as to the subversive aims or purposes of the organization.

"4. Publicly or privately advocated revolution by force or violence to alter the constitutional form of Government of the United States."

(A) Also includes cases where the individual has

"5. Deliberately omitted significant information from or falsified a Personnel Security Questionnaire or Personal History Statement. In many cases, it may be fair to conclude that such omission or falsification was deliberate if the information omitted or misrepresented is unfavorable to the individual.

"6. Violated or disregarded security regulations to a degree which would endanger the common defense or security.

"7. Been adjudged insane, been legally committed to an insane asylum, or treated for serious mental or neurological disorder, without evidence of cure.

"8. Been convicted of felonies indicating habitual criminal tendencies.

"9. Been, or who is, addicted to the use of alcohol or drugs habitually and to excess, without adequate evidence of rehabilitation."

Category (B) includes those cases where the individual or the spouse has

"1. Sympathetic interest in totalitarian, fascist, communist or other subversive political ideologies.

"2. A sympathetic association established with members of the Communist Party; or with leading members of any organization set forth in Category A, [illegible]

clude chance or casual meetings, nor contacts limited to normal business or with official relations.)

"3. Identification with an organization established as a front for otherwise subversive groups or interests when the personal views of the individual are sympathetic to or coincide with subversive 'lines'.

"4. Identification with an organization known to be infiltrated with members of subversive groups when there is also information as to other activities of the individual which establishes the probability that he may be a part of or sympathetic to the infiltrating element, or when he has personal views which are sympathetic to or coincide with subversive 'lines'.

"5. Residence of the individual's spouse, parent(s), brother(s), sister(s) or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas thereof, when the personal views or activities of the individual subject to investigation are sympathetic to or coincide with subversive 'lines' (to be evaluated in the light of the risk that pressure applied through such close relatives could force the individual to reveal sensitive information or perform an act of sabotage).

"6. Close continuing association with individuals (friends, relatives or other associates) who have subversive interests and associations as defined in any of the foregoing types of derogatory information.

"7. Association where the individuals have enjoyed a very close, continuing association such as is described above for some period of time, and then have been separated by distance; provided the circumstances indicate that a renewal of contact is probable."

(B) Also includes those cases where the individual has

"8. Conscientious objection to service in the Armed Forces during time of war when such objections cannot be clearly shown to be due to religious convictions.

"9. Manifest tendencies demonstrating unreliability or inability to keep important matters confidential; willful or gross carelessness in revealing or disclosing to any unauthorized person restricted data or other classified matter pertaining either to applicants

of the Atomic Energy Commission or of any other Governmental agency; abuse of trust, dishonesty; or homosexuality."

The trier is not limited to the criteria and may examine anything he thinks relevant.

It should be noted that for most of the criteria which have loyalty connotations, either the individual or his spouse's acts may be considered. The criteria most closely resemble those of the Defense Department for civilian employees; but they may be characterized as more moderate and as evincing a greater tolerance for deviation or experimentation in the past. The presence of a relative abroad is of significance only when the individual's views are along subversive lines, and an evaluation is to be made of the chance that pressure could be successful. Personal habits which might disqualify are more carefully defined and limited.

The most important difference is to be found in the AEC restriction of (3) to the Attorney General's list. The individual must have been and continued to be a member after the organization was identified unless his participation before identification was made was such that he should have known of the subversive nature of the group. "Sympathetic association" is restricted to leading members of these organizations.

However, "front" and "infiltrated" organizations are not limited to the Attorney General's list. "Identification" would seem to require, however, a deeper involvement than "participation in the activities".

Procedures

The Act provides that the Commission shall make adequate provision for review of dismissals. Since 1948, incumbents have been granted hearings and appeals and in 1950 these were extended to applicants. The policy of the AEC is to give maximum opportunity for administrative review that is consistent with national security.

The AEC has emphasized screening and informal procedures to reduce the number of cases. This may result in applicants' being denied employment by the government or the contractor on suitability grounds, without the protection of a hearing but

On receipt of derogatory information, if no grave security question is raised, the local AEC officer may have an interview for clarification. Clearance is not denied on the basis of the interview.

The Manager of the Operations Office concerned will present to the individual the notification letter with the adverse information. He must answer within ten days. A hearing will be scheduled before a Personnel Security Board. Failure to answer is a waiver of the board and all review proceedings.

The Board is chosen from local AEC and contractor employees, all having clearance. At least one must have some knowledge of the field of work of the individual. There is a right to challenge for cause, but the challenge is decided by the Manager who appoints the board.

Witnesses may testify under oath or not. The failure of the employee to testify may be considered by the board. The allegations may be amended and an adjournment to answer will be given. Added investigation may be requested. The hearing, in other essentials, is like the hearings previously described.

The recommendations, with the findings and a statement of reasons, is submitted to the Manager. He reviews the file and the effect which denial of clearance would have on the atomic energy program.

If the recommendation is adverse, the employee is notified and given the Manager's findings. He is told of his right to appeal to the Personnel Security Review Board and to submit briefs. The Manager might make a favorable recommendation and the General Manager, for the Commission, might not agree. Again, the individual is allowed to submit briefs to the Review Board. The board reviews and makes recommendations to the General Manager. The General Manager makes the final determination for the Commission, which itself considers important cases.

IV. THE PORT SECURITY PROGRAM

The Coast Guard program for clearing maritime and dock workers is probably the least known of all Federal govern-

million people. When fighting began in Korea, there was no legal authority for any maritime personnel security measures. The Coast Guard developed a voluntary plan with shipowners and some unions to prevent access to American ships and docks of anyone deemed a security risk. An appeal right was contemplated but the program was never completed. An interim procedure gave an appeal to a Coast Guard officer from which appeal could be taken to a five-officer board in Washington. This continued until the end of 1950 when the current program went into effect.

The Magnuson Act, passed in 1950, provides that "whenever the President finds that the security of the United States is endangered by reason of actual or threatened war . . . or of subversive activities," he may institute measures to "safeguard against destruction, loss or injury from sabotage or other subversive acts, accidents . . ." the ships and ports of the nation. The regulations were promulgated under this Act and an Executive Order which authorized the Commandant to prescribe identification papers for clearance.

Service on all vessels is restricted unless exempted by the Commandant. Seamen are already required to have a Federal license; security validation is stamped on that. The seaman applies at a Coast Guard Marine Inspection Office for clearance by the Commandant. A check is made against the files of the FBI and the Office of Naval Intelligence; there is no independent investigation. Clearance is denied if "the applicant's character and habits are such as to authorize the belief that the presence of the person aboard vessels of the United States would be inimical to the security of the United States."

Criteria

The criteria for determining if seamen are security risks are that the individual, on all the evidence available,

> "1. Has committed acts of treason or sedition, or has engaged in acts of espionage or sabotage; has actively advocated or aided the commission of such acts by others; or has knowingly associated with

"2. Is employed by, or subject to the influence of, a foreign government under circumstances which may jeopardize the security interests of the United States.

"3. Has actively advocated or supported the overthrow of the Government of the United States by the use of force or violence.

"4. Has intentionally disclosed military information classified confidential or higher without authority and with reasonable knowledge or belief that it may be transmitted to a foreign government or has intentionally disclosed such information to persons not authorized to receive it.

"5. Is or recently has been a member of, or affiliated, or sympathetically associated with, any foreign, or domestic organization, association, movement, group, or combination of persons (i) which is, or which has been designated by the Attorney General as being, totalitarian, fascist, communist or subversive, (ii) which has adopted, or which has been designated by the Attorney General as having adopted, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or (iii) which seeks, or which has been designated by the Attorney General as seeking, to alter the form of the Government of the United States by unconstitutional means: Provided That access may be granted, notwithstanding such membership, affiliation or association, if it is demonstrated, by more than a mere denial, that the security interests of the United States will not thereby be jeopardized."

The criteria are essentially the same as those of Executive Order 9835, the former Employees' Loyalty Program. Questions arising under suitability criteria are dealt with through the licensing procedure.

Access to designated waterfront facilities is also subject to clearance. The Commandant designates which facilities are restricted. They are those where shipping and other activity vital to military defense or military assistance are being carried on, and where explosives or other dangerous cargo is loaded. All major port areas have been so designated.

The Coast Guard issues a Port Security Card but other clearance is accepted.[42] An applicant must be sponsored by an authorized official of the company or the union. There is no provision for interim clearance.

A new criterion is added for dock workers,

"f. That such person is otherwise not a suitable and safe person to have access to such waterfront facilities and port and harbor areas, including vessels therein, by reason of:

"1. Having been adjudged insane, having been legally committed to an insane asylum, or treated for serious mental or neurological disorder, without evidence of cure.

"2. Having been convicted of any of the following felonies, indicative of a criminal tendency potentially dangerous to the security of such waterfront facilities and port and harbor areas, including vessels therein; arson, unlawful trafficking in drugs, espionage, sabotage, or treason.

"3. Drunkenness on the job or addiction to the use of narcotic drugs, without adequate evidence of rehabilitation."

Procedures

If clearance is denied or revoked, the person is notified in writing. He is told that he may appeal and what rights he would have at the hearing. His appeal is to an Appeal Board which is convened by the Commandant in one of the Coast Guard Districts. The chairman represents the Coast Guard.

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[42] The Coast Guard Port Security Card is not required if the individual holds:

1. Merchant Mariner's Document showing security clearance.
2. Armed Forces Identification Card.
3. Identification credentials issued by Federal law enforcement and intelligence agencies to their officers and employees.
4. Identification credentials issued to public safety officials when acting within the scope of their employment.

The two other members represent management and labor. These are nominated to panels by the Secretary of Labor and the Chairman makes his selection from the panel. The labor member will if possible be of the same union as the worker. If there is no one available with this qualification, one of the public alternates will be chosen. They are usually attorneys in the community. If practicable, at least one member of the Board should be an attorney.

A bill of particulars is prepared by the Commandant and furnished to the Chairman of the Board for transmission to the appellant. He may answer within ten days and within fifteen days after the notice is received, the Appeal Board will meet. Continuances are freely granted. The employee is informed in advance who the members of the Board will be and what their business or union affiliations are. He may challenge for cause, with affidavit and an oral presentation. In addition, he has two peremptory challenges, one directed to the management representative and one for labor. The appellant may decide if the replacement for the challenged member will be from management or labor, as appropriate, or from the public members of the panel.

The Coast Guard presents no evidence as a rule. The appellant may decide if hearings will be open or closed. The regulations governing the hearing generally are like all regulations on hearings.

The Board may request further investigation. On the hearing and the file, the Board makes a recommendation, with its rationale. The Commandant may approve or reject the decision or remand the case. An adverse decision may be taken to a National Appeal Board which sits in Washington. It, too, is a three-man board, composed of Coast Guard, management and labor. There is the same right to challenge. The hearing provisions are the same. The appellant may appear, have counsel, etc. The Commandant still makes the final determination. Even if the clearance is eventually granted, there is no provision for compensation for what may be an extended period of unemployment.

V. CIVIL SERVICE SEPARATION PROCEDURES IN NON-SECURITY CASES

Competitive and classified civil service are terms used interchangeably by Civil Service regulations. The competitive status is defined as one which permits promotion,[43] transfer,[44] reassignment,[45] and reinstatement without competitive examination. Status is acquired by probational appointment after competitive examination, by statute, or by other civil service rules.

The applicant for civil service appointment takes either an "assembled" or an "unassembled" examination. The assembled examination is an examination in the conventional sense—tests of skill, of intelligence, etc. The unassembled examination is not an examination at all. The applicant, in his personal history sheet, lists his educational and experience qualifications. He is given an interview. These are evaluated quantitatively and qualitatively and a rating is assigned.

The successful applicant is appointed to a position. The appointment may be temporary, for an indefinite period, or permanent. A temporary appointment is for a stated period, under one year. A temporary emergency appointment is for a period less than a month and is made without examination.

Permanent appointment was common prior to World War II. During the war, most appointments were made for the war period and no permanent competitive status was gained. A similar provision was put into effect with the Korean War.[46] Appointment is generally made for an "indefinite" period. Indefinite appointees are not eligible for retirement benefits, on

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[43] Promotion—"the advancement of an employee while continuously employed to a higher classification act grade or to a higher grade within the same agency—established pay schedule in which grades are assigned or from a lower rate paid under authority other than the classification act or vice versa or to a higher rate under a different agency-established pay schedule or under a pay schedule in which no grades are assigned." 5 CFR 64.301.(10).

[44] Transfer—a change of position during continuous Federal service without a break of one work day from one agency to another.

[45] Reassignment—a change without promotion or demotion from one position to any other position, while serving continuously within the same agency.

[46] Executive Order 10180, November 13, 1950. All future appointments were to be made non-permanent, with a few exceptions allowed the agency to maintain its permanent strength.

the whole. In reduction in force, the indefinite appointee is separated from service before the permanent. Almost one-third of all employees have indefinite appointments.

The permanent and the indefinite appointee serve a probation period of one year. The probationer has few rights procedurally until the year is completed.

The President may add to, or remove positions from, the classified service. If a position is removed, the incumbent is no longer entitled to the protection of the civil service procedure and may be separated at the will of the appointing authority.

Positions in the executive department excepted from the Civil Service are listed in three "schedules", A, B and C. Schedule A and B contain positions for which it is not practicable to hold competitive examinations. For jobs in Schedule A, no test is required. For Schedule B, a non-competitive examination must be passed. Executive Order 10440, March 31, 1953, authorized a new schedule, C, for positions of a confidential or policy-making nature. The Civil Service Commission has been issuing a series of directives stating which positions in each agency are included in this category. Many of the positions listed were previously in Schedule A. About 8 percent of federal employment is in "excepted" categories.

An applicant may be denied examination or a candidate denied appointment for cause. The Commission includes as cause:

1. Dismissal for delinquency or misconduct.
2. Physical or mental unfitness for the position.
3. Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.
4. Intentional false statements or deception or fraud in examination or appointment.
5. Refusal to furnish testimony to the Commission.
6. Habitual excess drinking.
7. Reasonable doubt as to loyalty.
8. Any legal or other disqualification which makes him unfit.

These are also cause for separation if they develop or are discovered after the employee enters on duty. A person disqualified for an examination may be denied another test for

a period up to three years. All appointments are made subject to investigation of character and fitness and the employee may be removed within eighteen months of appointment if the findings are adverse.

Removal for Cause

It is a popular belief that a person appointed to a civil service position is almost impossible to remove. During a fifteen-month period ending March, 1948, 21,304 Federal employees were separated from employment for cause. Over half, however, were "blue collar" workers, who were only about 27 percent of personnel. Discharge was based largely on definite offenses —drunkenness, absence, past convictions, etc.—and rarely on general incompetency.

Contrary to the popular belief, there are few statutory restrictions on removal. The Lloyd-LaFollette Act, the basic law in this field, stated that removal of a civil service employee should be made "for such cause as will promote the efficiency of such service." Employees with status must be advised of the reasons for the action and given an opportunity to answer. The permanent or indefinite employee, past his probationary or trial period, and the employee having a competitive status but serving in an excepted position neither confidential nor policy-determining, has the protection of these civil service removal minima. The employee separated by order of the Commission because his appointment was contrary to regulation is not entitled to this procedure.

The Act does not define cause for separation. The Civil Service regulations allow removal for the same reasons which disqualify an applicant from examination or appointment. Religion, marital status, race, national origin or political belief, other than acts forbidden by law, are not cause for discharge. Removal based on any of these may be appealed to the Commission.

A temporary employee may be separated on notice in writing from the appointing authority. The probationary worker receives a notice in writing, giving the reasons for the discharge and the effective date of separation. He has no opportunity to answer except in the discretion of the agency.

The permanent or indefinite appointee, past probation, receives a notice in writing of the adverse action proposed. With the notice, he gets a list of charges, specific and detailed; but the supporting evidence need not be included. The employee need not be told who preferred the charges against him. However, the charges must be sufficiently factually detailed to allow answer, and no discharge can be based on charges not given the employee.

The worker is retained in an active duty status during this period of administrative proceedings. If necessary to protect government property, other employees or the public, he may be temporarily assigned to other duties or placed on leave without pay with his consent. In emergency, the department may suspend, issue charges, and require the employee to answer in a shorter period than is usually granted.

The employee must be given a reasonable time to answer the charges. The agency must consider the answer and at the earliest practicable date give the worker a written decision. If the determination is adverse, he is notified of the reasons for it and of the effective date of the adverse action. He is not entitled to a trial or a hearing or to any examination of witnesses, but these may be granted by the agency in its discretion.

The Act gives no review to the employee of the agency decision. The Civil Service Commission will not investigate unless it is shown that the required procedure was not followed or that removal was made for a prohibited cause. The employee must request review within ten days of the effective date of the action or the last decision of the employing agency review system.[47] His request must be detailed and under oath. The supporting evidence for his claim must be set forth in his request. A prima facie case for review must be made. The Commission may recommend reinstatement but it has no power to order it. The reinstated employee is compensated for any earnings lost in the period of wrongful discharge. He is deemed in service for this time except for accumulation of leave.

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[47] Extension is granted only on a show of circumstances beyond the control of the employee.

Veterans' Preference

The veteran and certain relatives of deceased or disabled veterans are entitled to preferred treatment, not only in appointment to civil service position but in separation proceedings. Almost half of all federal employees are in this status. The "Preference Eligible" serving under permanent or indefinite appointment, past the probationary period, may not be removed,[48] suspended, for more than thirty days,[49] furloughed without pay, reduced in rank or compensation,[50] or debarred from future appointment except for cause. The temporary or probational worker is not covered by these provisions; nor is the legislative or judicial employee; nor are most appointees confirmed by the Senate. The preference employee must be given thirty days advance written notice of the adverse action contemplated.[51] Where there is reasonable cause to believe he is guilty of a crime, he receives only such notice as is reasonable under the circumstances. The notice contains the reasons for the proposed action. He has a reasonable time to answer personally and in writing. His answer must be considered by the agency. If a decision is made adverse to him, he is notified in writing of the determination and of his right to appeal to the Civil Service Commission.[52]

The Commission does not consider appeals from loyalty hearings since the abolition of the Review Board. It will not

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[48] Removal—separation from the service on charges of delinquency or misconduct, or because the employee's capacity is not sufficient to justify his retention in the service.

[49] Suspension—a temporary non-pay status and absence from duty required by the appointing officer for disciplinary reasons or for other reasons pending inquiry.

[50] If a non-veteran is demoted, he is notified in writing of the reasons for the action and of his right to appeal through whatever grievance procedure the agency had adopted.

[51] The notice states what action will be taken under the proceeding. If on review the agency desires to take a more severe action, new charges must be issued and a new review is required. If the penalty imposed is less severe than the action proposed in the notice, a new proceeding is not necessary.

[52] If the employee accepted a reduction in rank on pressure from the agency, he has not waived his rights.

The agency must ascertain whether an employee is a preference eligible and treat his case accordingly. It is not excused by ignorance of his preferred state.

consider a case until the employee has exhausted any remedy his agency may have.

Within ten days after the effective date of the adverse action, or of the last adverse decision of an agency appeal, the preference eligible may appeal to the Commission in writing. He encloses the charges, the answer, the notice of adverse decision and any added documentary evidence he wishes to submit. He must include evidence of his preference status.

His documents are examined by the Chief, Appeals Examining Division, or by the Regional Director, if it is an appeal in the field, to see if the employee comes within the scope of the act. If it is decided he does not, he is informed of his right to request reconsideration and to submit evidence and arguments in support of his claim. If the decision again goes against him, he may appeal to the Commissioners on the point.

If he is within the Veterans' Preference Act, the case is docketed for investigation and adjudication. Investigation will be made as necessary. No pledge of confidence is made to witnesses. Evidence is discussed by the investigator with the administrative officer of the employing agency who made the adverse action against the employee and with other officers of the agency. They are requested to give their version of the dispute. The employee is informed of any data the agency may furnish and is allowed to insert his views on it. The agency may then comment on his comments and he on theirs.

The Civil Service Commission reviews both on the merits and the procedure. The employee may request a hearing. He may appear at this personally or through representatives. The agency also appears. Both sides may present evidence and witnesses. Testimony is given under oath. There is no subpoena power. If a transcript is not directed by the hearing examiner in charge, he summarizes his notes and the parties may take exception to any claimed inaccuracies in the summary.

The decision is made by the Chief, Appeals Examining Office, or by the Regional Director, depending on the location of the hearing. The determination includes an analysis of the evidence, a finding, the reasons for the finding, and a recommendation. The agency and the employee receive copies of

the decision. If it is adverse, the employee is notified of his further appeal rights.

Within seven days, an appeal may be made to the Board of Appeals and Review of the Commission. The Board reviews the record. In its discretion, it may allow the parties to appear personally and argue but there is no right to further hearing. Evidence which could have been previously submitted will not be considered. If new evidence appears, the Board may remand the case to begin the procedure again or, in exceptional cases and in its discretion, it may receive the evidence. An appeal may be taken to the Commission, at the Commission's discretion, with a personal appearance or written presentation. Under the Veterans Preference Act, the agency must take such corrective action as the Commission, at any of these appeal stages, recommends.

The Commission may examine the case of any separated worker to determine whether he is eligible for future government employ. Request must be made within six months of separation or within sixty days of the last adverse decision on appeal.

Fair Employment, Hatch Act

If the employee claims that he was or is being separated because of race, creed or national origin, he files a complaint within three months of personnel action with the supervisor of the Fair Employment Officer.[53] An attempt is made to settle the dispute at the supervisory level when possible. If for some reason this cannot be achieved, further complaint is made to the Deputy Fair Employment Officer who investigates and in turn attempts to adjust the grievance.

Unsettled complaints are taken to the Fair Employment Officer who makes his attempt at adjustment. If he, too, fails, the employee may be given a hearing. The Fair Employment Officer after hearing makes findings of fact and a decision. If the determination is unfavorable, further appeal is possible to the head of the department or agency.

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[53] An appeal is granted the applicant denied appointment because of race, creed or national origin. He files his complaint with the Fair Employment Officer.

From the agency, appeal may be taken to a Fair Employment Board in the Civil Service Commission. The Board can refuse to accept an appeal. If it takes the case, the employee is usually accorded a hearing. If new evidence appears, the case is remanded to the agency head for new determination.

The Commission does not allow duplicate appeals under the Fair Employment procedure and the Veterans Act. The Fair Employment procedure is available to all employees.

Under the Hatch Act, Federal employees are limited in the type of political activity in which they can participate. A government worker who violates this limit may be removed from his job and denied future government employ.

The employing agency and the Civil Service Commission make a joint investigation, unless either cannot do so. In the course of this investigation, the employee is given an opportunity to make a statement to the investigator in writing or personally and to furnish the names of witnesses to support his defense. If the case against him is founded on record evidence, investigation may be conducted by correspondence.

If the investigator finds evidence of a violation of the provisions of the Hatch Act, a proposed order is issued to the employee. This includes a statement of the charges and the information in support of them. The employee has fifteen days in which to answer.

He may request a hearing. It is within the discretion of the Civil Service Commission to grant or deny the request. Hearings are held before an examiner, in Washington unless otherwise specified. There is no subpoena power. The hearing is unilateral. Evidence in support of charges will not be given. Evidence gathered in the course of investigation is limited to voluntary disclosure and held in confidence. The employee may attempt to rebut the charges by his own testimony, by witnesses and by any evidence he may be able to produce. The counsel for the Commission may cross-examine the employee if he testifies, and any witnesses the employee presents.

A summary of the hearing is prepared by the employee or his representative and by the counsel for the Commission;

doubt is resolved by the Examiner. Either party may except to this summary. In the discretion of the Examiner, briefs may be submitted. The Commission decision is based on the entire record, the investigative file as well as the hearing. The final order contains a statement of the charges substantiated and the penalty if the decision is adverse.

The employee must be removed and barred from future employment in the Federal government unless the Commission by unanimous vote authorizes a lesser penalty. In practice, the Commission rarely invokes this removal power. As a minimum in an adverse decision, it must suspend without pay for at least 90 days. The Commission may treat the matter from a suitability view and establish a limited period in which the employee is barred from Federal position.

If the employee is in a position excepted from the classified civil service, the Commission may clear his record for future employment but it cannot require the agency to reemploy him.

Reduction in Force

In fiscal year 1953, there was a reduction in Federal personnel of 116,700; in 1954, over 150,000. In "reduction in force" due effect must be given by statutory direction to length of service,[54] to efficiency,[55] and to military preference.[56] The employee is assigned a tenure status on these criteria. When he is notified of a proposed adverse action under R.I.F., as it is known, he may examine the registry of tenure status and the records bearing on the determination of that status. Generally, appeal rights are granted within the agency. Further, an employee who believes that the regulations are not, in some way, being correctly applied may appeal to the proper branch

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[54] Military service is included.

[55] Each agency must have a performance rating system. Each agency also has a board of review of the rating. One member is chosen by the employing unit, one by the employee, and a chairman is furnished by the Civil Service Commission.

[56] Preference employees with an efficiency rating of "good" or better have retention preference over all other competing employees without regard to length of service. Those with rating below good are retained ahead of competing non-preference employees having equal or lower rating.

of the Civil Service Commission.[57] From this division, another appeal may be made to the Commissioners.

Courts have uniformly upheld the concept that the power to remove is incident to the power to appoint, except for any statutory limitations. If the statutory minima are met, a court will not examine the merits of the case. Allegations of arbitrariness must be so clearly established as to show the action was malicious and in bad faith. Procedural defects, however, will be reviewed.

Departmental Appeals

Over and above these minima, the agencies may provide what intradepartmental appeals they desire. Large agencies have elaborate procedures with many levels of appeal.[58]

The Post Office Department has different proceedings for different personnel actions. If the employee has a grievance he takes it up with his supervisor. If the grievance is not settled at this stage, it may be heard in turn by the next supervisor, the unit head, a hearing board and a review hearing board, the Bureau head, a department Board of Appeals and the Postmaster General. A settlement at any stage would, of course, stop further processing. Separation procedures follow the civil service minimum. It is not clear whether the employee against whom separation proceedings have been brought may avail himself of the greater protection of the grievance system.

The Army also maintains grievance and separation procedures; the grievance procedures are available in separation cases. The employee is given a hearing at the local level and a recommendation is made to the commanding officer. If he makes an adverse decision, the worker may pursue review through successively higher echelons of appeal, up to a Board in the Office of the Secretary of the Army.

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[57] When an employee cannot be removed without undue interruption to the work, he may be retained ahead of those with a higher status. Employees affected adversely by this have the right to notice and to appeal to the Civil Service Commission.

[58] Some do not. In reply to inquiry, the Justice Department stated simply that an employee may file appeal to the Attorney General. Emphasis is placed on complete investigation before removal proceed-

The Veterans Administration has a consolidated procedure for separation, disciplinary action, grievance, performance ratings and discrimination. All issues are to be aired in one proceeding. An issue which was raised or which could have been raised cannot be made the subject of a future grievance proceeding. All grievances are, when possible, to be settled at the supervisory level. If this cannot be done, the employee may request a hearing before an agency board. The Manager of the station or the Assistant Administrator at the Central Office make nominations for the hearing panel and the members of the panel are selected by the employees. No Assistant Manager or personnel officer is eligible. Each panel has the aid of an Executive Secretary from the Personnel Office who arranges hearings and advises the Board. The Administration chooses a member from the panel, the employee chooses a member, and these pick the third to serve as Chairman. If they cannot agree on a choice, he is chosen by lot from the remaining members of the panel. Hearing is usually held at the place of employment. Hearing is on government time. The employee and his representative, if the latter is also a VA employee, may prepare the case during working hours.

Hearings follow the usual administrative pattern. In removal cases, the supervisory officer presents evidence in support of the allegations of the original notice. The employee may rebut. The recommendation of the Board is based solely on the hearing. The Assistant Administrator of the station makes the decision. Appeal to the Administrator is possible.

Appeal cannot be had simultaneously under Civil Service and this procedure. Issues raised before the Civil Service Commission cannot be readjudicated under the VA process.

Summary Comparison of Security and Other Procedures

Neither the Civil Service removal nor the Security program requires that an applicant be given charges. Under Civil Service, the temporary employee may be separated at any time. The probationary worker receives the reasons for his discharge but opportunity to answer is in the discretion of the employing agency. Temporary and probational employees

receive, under Executive Order 10450, both charges and the opportunity to reply to the charges.

The employee, past probation and serving under a permanent or indefinite appointment, has, under civil service, a right to charges and an opportunity to answer. Only the preference eligible is entitled to a hearing. Under security regulations, this class of employee has a right to a hearing regardless of veterans' preference. Preference eligibles have, in removal cases, an appeal to the Commission. Other employees have limited appeal privileges. Agency decision is final in security cases for all employees.

On the whole, the agencies have granted in their security regulations few procedural rights beyond the minima set by Public Law 733. In Civil Service removals, the agencies have gone far beyond the requirements of the Acts and the Civil Service regulations.

The security regulations, in sticking close to the requirements of the Act, remain close to each other. Non-security separation procedures vary widely among the agencies.

In separation proceedings other than political activity cases, there is little use made of confidential information. The employee receives detailed charges. Cases have required that these be far more specific than those found in security proceedings. Separation is based on the charges made and proved, not on undisclosed information in the personnel file.

S. W.

VI. UNANSWERED QUESTIONS

A formal description of the statutes, executive orders, and regulations raises more questions than it answers. It may be desirable to suggest some of the matters that this memorandum leaves almost unexplored and entirely unresolved. Herewith not just twenty questions, but twenty clusters of questions.

1. Is the security-risk concept properly applicable to all government employees? To all military men? To all maritime workers? That is, do these employees, by reason of their employment, invariably raise a potential security threat?

2. In programs confined to employees with access to classi-

Defense and AEC contractors, are the limits too broad or too narrow? On the one hand, are the standards for classifying security material too inclusive to serve as a guide for employment tests? On the other, are there areas of private employment that in fact conceal substantial hazards to security even though no classified material is involved? The Department of Defense urges that such areas exist.

3. Are the criteria that define the necessarily general standards sufficiently precise and meaningful? Do they make sufficient allowance for the situation of the individual employee, his capacity for injury, his capacity to avoid injury?

4. Of great importance, how competent are the investigative agencies? Do they ask the right questions? Report the answers accurately? Overstress derogatory information? Make reliable evaluations of information from undisclosed informants?

5. Of equal importance, what kinds of information are considered derogatory? Do the charges that are made reasonably relate to the criteria? Are they overweighted with remote associations and affiliations, with elusive elements of opinion and sympathy? Do they force the employee to rebut trivial or baseless accusations?

6. What are the effective standards of evaluation by security officers? Do they establish unduly severe standards for applicants and others who are not entitled to a hearing?

7. Can and do security officers bring pressure to bear on employees to resign without availing themselves of the opportunity to make a defense?

8. Security officers often have power to deny clearance for access to classified material, without charges or hearing. When such access is essential for the employee's usefulness, does the use of this power circumvent the established procedures? What standards guide its use? Should the employee have an opportunity to challenge the denial?

9. Can one describe the effective standards used by hearing boards and reviewing officials? Do the actual grounds for decision meet the prescribed standards? Does the process throw

but of establishing an affirmative case as to his loyalty and discretion?

10. If this is so, is it a reasonable burden to impose? Does the hearing process open up unnecessary or improper inquiries into the employee's private life, private opinions, and private beliefs?

11 The hearing and review balance the investigative report against the employee's sworn defense. Is adequate allowance made for the ex parte, unsworn, untested, and undisclosed elements of the investigative report? Is a hearing a hearing at all when the employee cannot confront the witnesses against him, or even be apprised of their evidence?

12. Is the burden of financing his defense a fair handicap to impose on the employee?

13. His burden is increased by the consistent practice in most programs of suspension without pay pending adjudication. Is this tactic a necessary security safeguard? Is it used to increase the pressure to resign?

14. What do comparisons of actual practice in security proceedings and ordinary civil service removal proceedings disclose as to the relative care and fairness of the two types? Are they properly comparable? Should security proceedings be more arbitrary, because of the risk to the government, or less, because of the stigma attached to an adverse decision?

15. Is the security program encroaching on normal civil service standards of suitability? Should questions of stability, criminal records, and sexual habits be intermingled with questions of loyalty? Should they be treated as security matters at all? Is there a demonstrable case that the homosexual, for example, is a special security risk, in or out of sensitive positions?

16. Does the inclusion of such cases in reports of the programs overstate or misstate the total hazard? Divert attention from the pursuit of direct counterespionage, countersabotage, and counterrevolutionary safeguards?

17. How far is it reasonable to demand the cooperation of every employee in laying bare his own history, associations and opinions? When are misstatements by the employee material to either security or suitability, and when are they seized

upon as a substitute for judgment on the merits? Similarly, with refusals to answer. Is any allowance to be made for claims of conscience or of constitutional privileges? Is the threat of criminal punishment for falsehoods a reasonable sanction, or an invitation to entrapment?

18. With regard to conscripts, who are involuntarily exposed to security tests, is it proper to condition their status on the fullness of their disclosures in a loyalty statement? To effect discharges under other than honorable conditions for past association and activities not part of military service? To foreclose promotion, and recognition of professional status (as with doctors) on like grounds?

19. With regard to maritime and other private employment, may government exclude citizens from the pursuit of common callings on security grounds, without affording them full due process of law? Do the present procedures meet the tests of due process?

20. Outside of especially sensitive areas, are the programs in action really directed to security, or are they loyalty programs? If the latter, do they penalize the concededly disloyal, the possibly disloyal, or the non-conformist? For which of these classes is loss of employment a deprivation that a democratic government can lawfully impose?

R. S. B.

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VII. SELECTED REFERENCES

Statutes

37 Stat. 555 as amended 62 Stat. 354, 5 USC § 652—The Lloyd-LaFollette Act on separation of civil servants for cause.

58 Stat. 390, amended 61 Stat. 723, 5 USC § 863—The Veterans Preference Act, including section 14 on separation of preference eligibles.

53 Stat. 1148, 5 USC § 118J (1939)—Section 9A of the Hatch Act which forbids a government employee to be a member of a group which advocates the overthrow of the government by force or violence.

64 Stat. 476, 5 USC § 22-1 (1950)—Public Law 733, the summary dismissal statute on which Executive Order 10450 is based.

68 Stat. 919 (1954)—The Atomic Energy Act, as amended.

64 Stat. 427, 50 USC § 191 (1952 supp.)—The Magnuson Act which underlies the Port Security Program.
66 Stat. 44, 5 USC § 655 (1952)—Transfer of investigation functions from the FBI to the CSC.
64 Stat. 828, amended 67 Stat. 88, amended P. L. 403, 83d Cong. 2d Sess., 6-18-54—The Doctors' Draft Law.

Executive Orders

9835, March 21, 1947—The Truman Loyalty Program.
10450, April 27, 1953—The Eisenhower security program.
10491, October 13, 1953—Addition of refusal to testify as security criterion.
10548, August 4, 1954—Rewording of criterion.
10422, as amended by EO 10459—United States program on the loyalty of United Nations' employees.
10173, October 20, 1953—Port Security.
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Hearings

Committee on Armed Services, Senate, 83rd Cong. 2d Sess. March 18, 24, April 1 and 8, 1954. Hearings on the Doctors Draft Amendment.
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Department of Defense Directive 5210.7—August 12, 1953.
SR620-220-1—Army—December 18, 1953.

NOPI-29—Navy—November 9, 1953.
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AR 605-200—Army—June 18, 1954.
Sec. Nav. Instruction 5521.6—Navy—June 23, 1954.
AFR 35-62—Air Force—June 23, 1954.

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10 CFR Part 4—The Atomic Energy clearance program.
33 CFR Part 121—The Coast Guard Port Security Regulations.
Department of Defense, Industrial Personnel and Facility Security Clearance Program—May 4, 1953.
Civil Service Manual.
Order No. 16112, August 22, 1941—the Post Office Grievance Procedure.
39 CFR sec. 135—the Post Office Separation procedure.
Veterans Administration Manual 5-2—Personnel Administration.

Other Forms

Department of Defense DD 98—Loyalty certificate for servicemen.
Department of the Army DA 1111—Certificate of Nonaffiliation with Certain Organizations.
Civil Service Commission Form 57—the standard application blank for Federal government employment.

MOTION FILED APR 27 1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

376

JOHN P. PETERS,

Petitioner,

vs.

OVETA CULP HOBBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
Attorneys for Emergency Civil Liberties Committee Amicus Curiae.

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376

JOHN P. PETERS, Petitioner, vs. OVETA CULP HOBBY, et al., Respondents.	

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Emergency Civil Liberties Committee by its counsel, hereby moves this Court for leave to file the attached brief *amicus curiae* in the above matter.

The grounds for this motion are that this case involves matters which go far beyond the issue of government employment discussed by the parties to this proceeding and raise issues which are of great public importance. The Attorney General has consented to the filing of this brief.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ.

IN THE

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BRIEF OF THE EMERGENCY CIVIL LIBERTIES COMMITTEE, AS *AMICUS CURIAE*

It is evident that the issues raised in this case are of profound importance. Directly, they affect the rights of employment of a part-time, unclassified, intermittent employee of the United States. The implications of any decision of the Court, however, may have far-reaching repercussions on the administration of the loyalty program in all of its aspects.

It would be difficult to overstate the extent of that loyalty program. Every man, woman and child who wishes a passport must satisfy an administrative official in the Passport

Office of his or her loyalty. Every person who works in a defense facility must pass a loyalty test administered by the Defense Department. Every longshoreman and every member of the Merchant Marine must meet the loyalty tests imposed by the Coast Guard. Every member of the Armed Forces must comply with the loyalty standards imposed by the Army, Navy and Air Force and, of course, every employee of the United States Government must meet the requirements which were imposed on the petitioner in this case and which he failed to meet.

Nor is this all. In most, if not all states, employees of state, county and municipal governments are subject to loyalty checks by a variety of local governing bodies. Because our children are said to be particularly susceptible to subversive influences, school teachers at all levels, from kindergarten to graduate schools, must undergo the same scrutiny of their organizational affiliations and activities, past and present, administered by local Boards of Education.

Recently in the District of Columbia, a license to deal in second-hand furniture was denied, on grounds of possible disloyalty of the applicant, and we are told that in Indiana wrestlers and boxers are subject to a loyalty test by the local authorities before they may perform before their public.

It is not particularly surprising that many private employers, notably in institutions of higher learning, have imposed similar tests.

The end is not yet in sight. The Federal Communications Commission has before it a proposal to screen all applicants for and holders of radio operator's licenses and permits, said to number almost a million persons. The American Bar Association proposes a similar test for attorneys. The list could be expanded almost indefinitely.

This dismal picture raises two questions, both of which go to the heart of any democratic system of government.

One of these questions is substantive. The imposition of loyalty tests on large groups of persons, aggregating, perhaps, a majority of the adult working population of the United States, is basically contrary to the fundamentals of a free political system. The standards of loyalty vary widely from one administrative agency to another and often from one case to another within the same agency. The concept of "defense facility" is an elastic one. As many serious commentators have pointed out, the sum total of all of this has been to destroy free discussion of basic political and economic issues, and without such discussion democracy cannot exist.

The other question raised is procedural, and it is the procedural question that must be decided by the Court in this case. As has frequently been noted, our liberties are, in large part, made up of the strict observance of the procedural standards of due process prescribed by the Constitution. None of those standards is observed in the administration of the loyalty program either by the Federal Government, by state or local governments, nor by any administrative agencies.

The record in this case, shocking as it is, is typical of the procedures through which many thousands of our citizens have lost their means of livelihood, and been stamped as "disloyal" in the minds of their fellow Americans. The respondents here seek to answer all of this by the citation of cases such as *Shurtleff* v. *U. S.*, 189 U. S. 311; *Eberlein* v. *U. S.*, 257 U. S. 82 and a host of similar cases, involving for the most part the removal of government employees for inefficiency or misconduct. The citation of those cases reveals a lack of appreciation of the magnitude of the problem which confronts this Court and the people of the United States.

Basically the issue here is not the right of the petitioner to maintain his employment, but rather the right of the people of the United States to maintain their democracy.

When dismissals from Government employment are based on the violation of civil service rules relating to the proper performance of duty, it may be that no constitutional issue is raised. When dismissals are based on regulations which impinge closely on the constitutional right of all persons who live in a democracy to think and talk, even though those thoughts and words may be characterized by some administrative official as disloyal, a problem of entirely different nature is raised.

It is evident from even a cursory examination of the record that none of the requirements of due process were met here, and, indeed, respondent does not seriously claim otherwise. Fundamental to any concept of due process is that decisions shall be made on the basis of evidence contained in a record and not on the basis of secret information known only to the tribunal which decides the case.[1] This is so elementary that it would seem quite unnecessary to argue it to this Court. This requirement is not a mere technicality, but goes to the heart of democratic procedures as they are understood in this country.

An opportunity to know the evidence offered by the opposition and to cross-examine witnesses produced by it is, as all know, not a foolproof method of arriving at the truth, but it is the best method we have been able to devise in several centuries of Anglo-American judicial procedure. It is a method without which no decision can be made by an administrative officer under our system of Government.

Superimposed on the evil technique of determining issues on the basis of evidence not disclosed to the parties, is the widespread use of informers by the Department of Justice and by other administrative local governing bodies which have aped the procedures of the Department of Justice. It is notorious that informers historically have been an unreliable breed, and our own recent history with informers

[1] Here even the tribunal deciding the case did not know the identity of the witnesses whose word it accepted.

is but the duplication of the history of many centuries of human experience. The recent revelations of Harvey Matusow, the recent recantations in the Lamb case now pending before the Federal Communications Commission, are but the most dramatic illustrations of the unreliability of informer testimony. None of this new, although perhaps it has only been recently brought to the attention of the public. Informed commentators for years have been writing and speaking on the unreliability of professional informers such as Paul Crouch, Louis Budenz, Manning Johnson, Leonard Patterson and a host of others.

We, of course, have no possible way of determining the nature of the so-called evidence on the basis of which the petitioner here was discharged. Perhaps the witness or witnesses who informed against him were Matusow and Crouch. Perhaps they were persons of similar occupation, still on the payroll of the FBI. Perhaps they were full time FBI informers. Perhaps they were neighbors, volunteers or private enemies who took this opportunity to demonstrate either their zeal to protect our country or their personal dislike of the petitioner. Actually, the character of the informer makes very little difference. Without an opportunity to confront and cross-examine witnesses, not even a partial guarantee can be offered that decisions will be just.

The respondent seeks to justify all of these strange and basically un-American procedures, including the non-disclosure of evidence, on the ground that they are required by national security. Apparently respondent believes that it is better to punish a thousand innocent persons than to permit one disloyal employee to maintain a job in the Federal Government, even one as remote from our defense program as Special Consultant to the Public Health Service in the Department of Health, Education and Welfare. This is a premise which no American, brought up in the traditions of our democracy, can possibly accept.

We agree wholeheartedly that at issue here is a question of national security. The evil which threatens our security, however, is precisely the evil against which the petitioner complains in this case. It is the evil of condemnation without trial. It is the evil of the destruction of the right of Americans to think and talk as they please. This evil is much more subversive and threatens our national existence much more seriously than any subversive conduct within the power of a special consultant to the Public Health Service, or, for that matter, a teacher in a public school or an employee in the Department of Printing and Engraving.

Our nation has experienced about eight years of loyalty investigations. In recent months there has been an increasing public demand for a re-evaluation of the entire process as it has become more and more clear that our fundamental liberties are endangered by an ever widening circle of purges. It is perhaps fortunate that this case comes before the Court at this time when the full impact of the loyalty program on our constitutional rights has become apparent.

Respectfully submitted,

Leonard B. Boudin,
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Committee *Amicus Curiae*.